THE LEGAL OBLIGATIONS ARISING OUT OF TREATY RELATIONS BETWEEN CHINA AND OTHER STATES

*(Thesis Approved for the Degree of Doctor of Laws in the
University of London)*

By Min-ch'ien T. Z. Tyau, LL.D.

*Lecturer on International Law, Tsing Hua College, Peking; Quain Prizeman in
International Law, University of London, 1914-1916; Honorary Member
of the Grotius Society, London; and Author of "China's New
Constitution and International Problems."*

WITH PREFACES

by

SIR JOHN MACDONELL, K.C.B., M.A., LL.D.

*King's Remembrancer and Senior Master of the Supreme Court, London;
Professor of Comparative Law, University of London; and
Vice-President of the Grotius Society;*

and

HON. WU TING-FANG, LL.D.

*Sometime Chinese Minister to the United States of America, Spain, Peru, Mexico and
Cuba; Minister of Foreign Affairs, Peking; and Author of "America
Through the Spectacles of an Oriental Diplomat."*

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FOREWORD

In commending the following dissertation—written while in London—to the notice of the public, the author is not a little diffident. The number of topics discussed in these pages is so wide and the access to first-hand information is so restricted that misstatements and inaccuracies are inevitable here and there. Besides, the method of treatment here adopted necessitates a rather jumpy and disjointed sort of discourse. Consequently, the number of omissions—e.g. the historical background—will be found to be considerable.

On the other hand, the author feels that the need of some such book fully justifies his rushing in where angels fear to tread. For, of standard works dealing with the history of China, its foreign relations, its customs and institutions, its industries and natural resources, its fauna and flora, etc., there is not a dearth. But the subject of China's treaty relations, or of the legal obligations arising out of such conventional relations, seems to have been left severely alone. Not a few, indeed, have dealt with, in the form of a brochure or monograph, one or more of the topics discussed herein, but an all-embracing survey of China's treaty obligations in the light of present day world conditions is still lacking. The work which comes nearest to our expectations is, perhaps, Dr. V. K. Wellington Koo's "Status of Aliens in China"—an excellent treatise which may well rank as a *vade-mecum* for the foreigners in this country. But it does not discuss all the questions connected with the various phases of the legal obligations arising out of the treaty relations between China and other states.

The present volume, therefore, represents no more than the results of an attempt to answer the questions which others have left unanswered. It is not intended to displace the numerous publications which the author himself has consulted in the course of his researches. Rather it is to supplement them with what still remains to be added. Therefore its only claim, if any, to originality is, perhaps, the method of treatment here adopted.

The subject of China's treaty obligations offers a wide region for the patient investigator, and in these pages the bare fringe only of this virgin field has been touched. More light and attention should be bestowed upon the different phases of this important question,

and it is sincerely to be hoped that many coadjutors, both foreign and Chinese alike, will delve further into this treasure-trove. If so, the efforts of the author to break the first sod will have been amply rewarded.

Approved last July by the University of London, the thesis as now published has been slightly revised and somewhat enlarged. Four new treaties and agreements have been added at the last moment, after the printers had already printed off the thesis proper. Hence the absence of any reference thereto in the body of the book.

The relations between China, Mongolia, and Russia are usually obscure to all but the well-informed; so the recent treaties and agreements between these three states are here inserted (Appendix E). Since the present volume deals with China's treaty obligations; one naturally expects to find some specimen copy of China's treaties with foreign powers. Accordingly, the Sino-Swedish treaty of commerce and navigation of 1908 is here included (Appendix F), as it consolidates what other nations have already obtained since 1842. As a rule, the treaties and conventions, etc., are brought down to January, 1916. The only exception, however, occurs in the case of the Cheng-chia-tun dispute with Japan, the notes exchanged in the settlement of which are here included (Appendix G). Read in conjunction with the Japanese treaties of 1915 (Appendix B), it will aptly illustrate the nature of the obligations which are imposed on China.

To those who contemplate investigating more thoroughly into the subject of the present volume, the British Parliamentary Blue Books and the United States Foreign Relations volumes, both published regularly, as well as other similar official publications, can be heartily recommended. It is usual to regard such publications as so much tedious reading, unentertaining and dry as dust, but that impression requires modification. For the author's experience has been one of genuine delight, as he waded through the play and interplay of thoughts, ideas and emotions contained within those bulky volumes. Published generally some four or five years after the events recounted therein had occurred, the despatches and telegrams which then passed between a government and its representatives in the country to which they were accredited, now read almost like romance. This exchange of views constitutes the almost only authentic indication of the true attitude of the government concerned on any given subject, and so is indispensable to all investigators.

Here is where a Chinese student of political history is greatly handicapped. Such publications in Chinese as the British Parlia-

mentary Blue Books and the United States Foreign Relations volumes, which are accessible to the public on payment of just the actual cost of printing, are practically unknown. In fact, it was only during the last two years that some such departure has been made. And, as a result, we have China's Official History (in English) of the 1915 Sino-Japanese Treaties (Appendix B), and the Chinese Official Communique (in English) on the Cheng-chia-tun Dispute with Japan, as well as the text of the documents exchanged therewith (Appendix G). That is a step in the right direction, and it is much to be hoped that the Peking Government will, in future, do more to enlighten the public on the merits of any international dispute whenever arising. For such publicity will stimulate its people to show greater interest in their international problems and, at the same time, assist those who desire to present China's version, which is generally unknown, of any given case before the bar of public international opinion.

To the numerous friends and public institutions—*e.g.* the British Museum Reading Room and the Colonial Office Library, London—who have helped him in the completion of this volume, the author desires to express his indebtedness. But an especial debt of gratitude is due to Sir John Macdonell, K. C. B., LL. D., Professor of Comparative Law, University of London, etc., under whose supervision the author was placed in the course of his preparation, whose continual encouragement has been a source of never-failing inspiration, and who has here contributed a prefatory note; to Dr. Wu Ting-fang, formerly Chinese Minister to the United States and lately Minister of Foreign Affairs, etc., who has also very kindly written a preface to this volume; and to Dr. Hawking L. Yen, Editor of the "Chinese Social and Political Science Review," and Author of "A Survey of Constitutional Development in China," for invaluable assistance.

Peking, July, 1917.

M. T. Z. T.

PREFATORY NOTE

I have been asked by my friend, Dr. Tyau, to add a preface to this volume. I do so with special pleasure at this time. To his own countrymen it cannot fail to be of supreme interest. It will scarcely be less so to Englishmen. They are, for the most part, ignorant of the recent history of the relations of their country to China; probably their memory is chiefly that of wars which they would fain forget. And of the relations of China to other European States, of that complicated story lucidly described in this volume, of the mass of treaties which Dr. Tyau disentangles and classifies, probably they know even less. I am not forgetting the existence of useful books and compilations on the subject; for example, Hertslet's Chinese treaties, published at the instance of the Foreign Office, from 1689 to 1907. No book, to the best of my belief, collects and analyses the voluminous materials with the care which Dr. Tyau has shown.

The volume appears opportunely. If once excusable, ignorance ought now to end. For China a new era is opening. Her intercourse, politically, commercially and not least intellectually with Europe, and, I would hope, especially with England, must increase. With her new Government, her vast population, her undeveloped wealth, her extraordinary, probably unequalled, aptitude for assimilating true European culture, while retaining what is best in her own civilisation; and, not the least asset, the universal reputation of the Chinese merchant for probity, her trade must expand. With this country it is already, and indeed for many years has been, great. I see many reasons why it should still further grow, now that her policy of isolation has ceased. It is to China in particular we must look for an expansion of our trade in the Far East.

The readers of Dr. Tyau's volume will learn, perhaps for the first time, that this policy of seclusion, so much criticised, is of comparatively recent origin and was for a time at least not without justification. Her rulers were in the sixteenth century, on the whole, tolerant and friendly to foreigners. "It was only when the newcomers had committed flagrant excesses against Chinese rights and property that it was compelled in self-defence to close its portals." "Up to the sixteenth century China had consistently encouraged foreign intercourse." Religious toleration was the rule. The Jesuits entered China at an early date and obtained great power and favour. Perhaps

the impartial historian would somewhat qualify these statements. But there is no question that at a time when European States were distrustful of strangers; when everywhere persecution for differences of opinion prevailed; when heretics were burnt at the stake, the Chinese Government had promulgated principles of toleration and practised them. It was only when the foreigner caused dissension that a policy of exclusion was adopted and that a change—it is true, a brusque change—took place.

The narrative deals only with treaties. But treaties are the outward and visible sign of foreign relations, in many ways the best history, the quintessence, of their true nature. It is significant that almost all the treaties concluded for some years with China and indeed, until recently, belong to the class known to jurists as *iniquum foedus*, the imposed treaty; they are not spontaneous agreements freely entered into by the parties; some of them are rather of the nature of what Roman jurists termed *deditio*. The narrative tells of the granting of large rights to foreigners in derogation of Chinese sovereignty. I would not seek to make the author of this volume responsible for any of these prefatory words; but in my view, it is the duty and the interest of Western States to do all that they can to preserve the integrity of China in the letter and spirit, to strengthen her Government and, as quickly as possible, to undo all that has been done to weaken her. The rest of the world will gain by her strength. Nothing is more likely to cause dissensions in the East among Western Powers themselves than a continuance of a *régime* which tends to weaken her. It is for the interest of the West that China should be united, peaceful and strong. The Capitulations which I have in mind are in every country where they exist a cause of weakness, a symbol of inequality. However careful the Western Powers may be not to press their rights, the system of extraterritoriality impairs the authority of the Government. Japan has abolished it. As Dr. Tyau shows, it has many drawbacks and produces much inconvenience, not confined to Chinese. Turkey abolished the capitulations before she became a belligerent. Perhaps we shall soon see China free from these trammels, the removal of which, to quote Sir Robert Hart, “would widen and not restrict the field for both merchant and missionary, would do away with irritating privileges, and place native and foreigners on the same footing.” “Restore jurisdiction (to the Chinese) and the feeling of responsibility to protect as well as appreciation of (foreign) intercourse will at once move up to a higher plane.” Great Britain has given conditional assent to the abolition of these leading strings. It will be to the honour and advantage of this country if she early consents to the termination of this tutelage.

The Western world cannot but watch with interest the entrance into full political life of about one-fifth to one-quarter of the human race. Remember that they are not unprepared for their new duties. It is not a case of a despotically governed people taking up the heavy task of self-government. To quote one of the shrewdest Western observers, "the Chinese practically in actual life are one of the freest people on earth." "China is one of the most democratic countries on earth." Her people, says the same observer, "have a genius for self-government." They are "a nation of free men." Such is also Mr. Colquhoun's view. He describes China "as a vast self-governed, law-abiding Society, costing practically nothing to maintain and having nothing to apprehend save natural calamities and national upheavals." Just as the Zemstvos have been a preparation to Russia for her new life, so will the ancient local institutions of China, never much impaired through all the vicissitudes of the Central Government, prepare her for her new and larger life.

Much remains to be done before the barriers between China and the West are broken down. Nations may long remain strangers and unknown to each other after their territories have been accurately mapped. There are moral discoveries to be made after the geographical are complete. It has often been so. It is still so with China. We know little of her, and she perhaps, as little of us. The comity of nations becomes much more than a phrase only when it implies a sincere desire to understand ways of thought and customs dissimilar to our own and to defer thereto. Outside the region of treaties much must be done. But these, so often in the past instruments of humiliation to China, must be amended. "There must be," in Dr. Tyau's words, "both give and take, and not all give and no take."

These are times of exalted nationalism; this or that country or race is to be *über alles*; this or that people are the chosen of Heaven. In spite of the excesses of racial intolerance, pride and self-sufficiency, there is emerging a conception of civilisation not as uniformity and conformity with any one standard, but as composed of varieties of cultures; not the pre-eminence of any one race, but recognition of the value, each in its own way, of many. The fulfilment of that conception will be helped, the world will be enriched, by the entrance into their full life of many millions of persons of great capacity and habits of industry, with a distinctive history and ideals of their own. For that change, which may not be far off, this book is a preparation.

London, May, 1917.

JOHN MACDONELL.

PREFACE

The subject of the legal relations existing between China and the foreign Powers is one of enormous complexity. There are, first of all, the general principles of international law governing dealings between states, principles, by the way, which are apt to be forgotten when a controversial matter arises for decision. Then there are the express provisions of treaties and documents, not always very clear in their meaning and sometimes very different in the Chinese and foreign texts. Lastly, there is a body of rules which are termed customs and usages; very intangible and indefinite, consecrated not necessarily by user from "time immemorial," but it may be simply because the thing has been done once before that it is thereafter for all future time quoted as precedent; not always legal from the standpoint of the general rules of the law of nations or even of treaty stipulations; and of which no particular person seems to be the proper judge and interpreter.

The range of topics, too, is a very broad one. It extends from the customs duties and immigration to the quarters used for the foreign legations and the terms of address between Chinese and foreign officials. Into this intricate maze others have indeed ventured but only to explore certain portions of the dangerous ground, and it remains for Dr. Tyau to be the first, so far as I am aware, to make a comprehensive and systematic survey. The book gives evidence of wide and painstaking research and is a very creditable work. As many of the subjects dealt with are highly controversial and, indeed, still form the topics for many of the despatches which pass almost daily between Chinese and foreign officials, it is of course not to be expected that every reader will agree with the views propounded. But, in any case, he has done good service by presenting both sides of the question, and no one can deny the fair and judicial treatment which he gives to the different problems.

The book concludes with an appeal for a revision of the treaties. Needless to say, it takes two to make a bargain, and while China is more than willing to do so, the Powers appear by no means anxious to meet her desires. In regard to the more ambitious aspiration to abolish extraterritorial jurisdiction in China, it is true that much has

to be done by her before she can make the formal proposal. But there are many other things antiquated, absurd, or unjust to her for which there is no excuse for any delay.

Take, for example, the case of the tariff. By the Protocol of 1901 following on the Boxer troubles, China had imposed upon her a crushing indemnity, and in order to enable her to pay it, the import tariff was permitted to be raised to an effective 5%. As it was also stipulated that *ad valorem* duties were to be converted into specific duties wherever possible, the tariff was fixed in 1902. Since then the prices of the commodities have greatly arisen even before the present war, but in spite of repeated efforts on the part of China to procure a revision of the tariff, so that it may be brought up to the effective 5% stipulated in the treaty, nothing has been done.

The injustice of this state of things is obvious, considering the scrupulous manner in which the Boxer indemnity obligations have been met by the Chinese Government. And this, too, is not so much a revision of the treaty as a revision of the tariff in accordance with the provisions of the treaty. If it is so difficult to get this thing done, which seems to be such a matter of course and to be due to China by justice and by treaty, one almost despairs of other things.

However, we have heard the public pronouncements of the statesmen of the Powers, that after the war justice and equality will rule among all the nations. We believe in them, and have great hopes of them. We expect that in carrying them out into practice in China, one of the first things that will be done will be a reasonable and equitable revision of our treaties.

Shanghai, July, 1917.

WU TING-FANG.

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THE LEGAL OBLIGATIONS ARISING OUT OF TREATY RELATIONS BETWEEN CHINA AND OTHER STATES

INTRODUCTION

(A) SCOPE OF WORK

“Treaty relations” connotes, by its very comprehensiveness, an assortment of documents. The expression includes agreements, arrangements, contracts, conventions, correspondence, declarations, memoranda, exchange of notes, protocols, and treaties. In most countries, perhaps, some of these instruments will not be so designated; in China, however, the same solemnity appears to be attached to all such documents.

Nature of Treaty Relations. The treaty relations between China and other states consist of negotiations entered into with either (a) individual states separately; or (b) two or more states jointly and severally—e.g. the international protocol of 1901; or (c) treaty as well as non-treaty powers—e.g. the universal Hague or Geneva conventions. In the present work the first two groups only will be considered, as to include the universal conventions may take us too far afield.¹

Economically, the eighteen states negotiating with China may be divided into three classes. We do not propose to discuss the question of political equality of states; we are, however, concerned with their legal equality. Consequently, such states comprise those whose commercial interests in China are either (a) large, or (b) small, or (c) non-existent. In the first division we may place the eleven signatories of the 1901 protocol—viz., Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, the Netherlands, Russia, Spain, and the United States; and in the third, the four Central and South American republics of Brazil, Chile, Mexico, and Peru. The other three states—Denmark, Portugal, and Sweden—

¹ To the following universal conventions China is a signatory:—Hague Conventions, 1899-1907; Geneva Convention, 1906; Convention relating to Hospital Ships, 1904; Convention for the Creation of an International Agricultural Institute, 1905; Hague Opium Convention, 1911. To the following she is an accessory:—Convention for the Publication of Customs Tariffs, 1890; Geneva Convention, 1864; Universal Postal Convention, 1874-1906; Universal Parcel Post Convention.

occupy an intermediate position; for, notwithstanding their non-signature of the above protocol, they are likewise direct beneficiaries of its indemnity clauses.¹

Classification of Treaties. In the majority of cases the treaty relations entered into between China and separate states individually resemble one another. As a general rule it may be stated that, given the same set of circumstances, certain features which are regarded as essential from the point of view of the treaty powers, invariably appear in all similar instruments. What these features are will, of course, depend upon the nature of the agreements as well as the interests of the powers concerned. For example, as between China and all the states negotiating with her, the stipulations regarding the appointment of diplomatic and consular agents and the grant of extra-territoriality are conspicuous by their presence. In the second place, as between China and the states whose commercial interests therein are either appreciable or of great proportions, such features are represented by provisions respecting commerce, navigation, tariff imposts, consular matters, customs regulations, etc. In the third place, as between China and those states who do no trade with her, the detailed clauses regarding commerce and navigation, etc., are replaced by those guaranteeing to the Chinese residing within the territories of the latter the most-favoured-nation treatment in respect of the enjoyment and protection of their rights and privileges. The most-favoured-nation clause is, however, retained, so that the commercial clauses not stipulated in their own treaties may be invoked whenever they are ready to avail themselves of their benefits.

In the group of treaties concluded between China and the commercial states is found much scope for diversity, particularly in the case of states possessing frontiers contiguous or conterminous with those of China. Commencing with the delimitation or rectification of frontier boundaries, the subjects of negotiation may enter into territorial cessions or leases, the regulation of frontier trade and kindred matters, etc. In the case of states with interests peculiar to themselves, their treaties will provide for a *modus vivendi*. Thus, some of the British and Portuguese conventions are concerned chiefly with the regulation of the trade in opium, whereas those of the American republics deal with Chinese immigration. A number of the Russian as well as British agreements attempt to find a solution for their frontier problems, whereas some of the latest conventions are designed to consecrate the principles of obligatory arbitration and the pacific settlement of international disputes.

¹ See *infra*, appendix A, tables.

The above is a bare outline of the subjects dealt with in the relations between China and its treaty powers. In appendix A (*infra*) such relations will be found analysed and dissected according to their chronological order and subject-matter. The tabular arrangement therein adopted may help to make clear the nature and sequence of these relations.

Nature of Obligations. In the following pages an effort is made to set forth the legal obligations arising out of such conventional relations. The nature of such obligations necessarily varies with the negotiations which called them into existence; and the latter being diversified, the former must needs be extensive in operation. These obligations will be classified under three heads:—(a) obligations which spring from treaty relations of a political character; (b) obligations which emanate from treaty relations of an economic or commercial character; and (c) obligations which flow from treaty relations of a general character. The engagements affect both parties, although in the bulk they concern the principal state. Consequently, not only the obligations contracted by China will be discussed, but those of the states negotiating with her will likewise be reviewed.

Need of Revision. Upon examination the obligations will be seen to bear inequitably upon China. As they were incurred when she was least capable of asserting her rights, their irksomeness becomes apparent. Under the circumstances, it is perhaps obscure how far international good faith is predicated in such transactions; for, the minds of the contractors not being *ad idem*, it may be argued that the position of the party claiming any benefits thereunder is not unimpeachable. Moreover, the undertakings having been contracted sixty or seventy years ago, are antiquated, and the doctrine of *rebus sic stantibus* may with good cause be appealed to. In short, the relations between China and other states need to be readjusted in harmony with its acknowledged status, the status of membership of the family of nations.

(B) HISTORICAL SKETCH OF TREATY RELATIONS

Eight Periods. Before proceeding to discuss the extent and limits of these legal obligations, it seems desirable to sketch briefly the history of China's conventional relations for two hundred and twenty-seven years. Such relations may be said to fall under eight periods. The first period, extending from 1689 to 1839, is preliminary; the second, from 1842 to 1855, represents the first settlement; the third, from 1856 to 1858, the second settlement; the fourth, from 1859 to 1860, the third settlement; the fifth, from 1861 to 1881, is the period of readjustment; the sixth, from 1884 to 1895, witnesses the loss of dependencies; the seventh, from 1896 to 1901, is

the "battle of concessions" and its aftermath; the eighth, from 1902 *et seq.*, represents restoration and final reconstruction.

First Period, 1689-1839. At Nipchu or Nerchinsk, on the Russo-Chinese frontier, was concluded on August 27, 1689, "the first treaty that was ever made by China with any foreign country."¹ It was a peace convention.² The frontiers between the two empires were defined (arts. 1 and 2); the Russian fortified town of Albazin was to be "completely demolished, and the people residing there, with all military and other stores and equipment, are to be moved into Russian territory" (art. 3); "the subjects of either nation, being provided with passports, may come and go (across the frontier) on their private business and may carry on commerce" (art. 5). Article VI thus embodies the elements of reciprocal extraterritoriality and the first functions of diplomacy:—"If hereafter any of the subjects of either nationality pass the frontier for private and legitimate business, and while in the foreign territory commit crimes of violence to property and life, they are at once to be arrested and sent to the frontier of their own country and handed over to the chief local authority, who will inflict on them the death penalty as a punishment of their crimes. Crimes and excesses committed by private people on the frontier must not be made the cause of war and bloodshed by either side. When cases of this kind arise, they are to be reported by the officers of the side on which they occur to the Sovereigns of both powers, for settlement by diplomatic negotiations in an amicable manner."

At Kiachta, on October 24, 1727, the second *traité de paix* was concluded.³ This "remained in force till June 1858—the longest lived treaty on record."⁴ The boundaries of the two territories were redefined (art. 3), and the Russians were granted the right to send triennial trading expeditions to Peking (art. 4) as well as to establish an ecclesiastical mission therein (art. 5). The mode of correspondence was provided for (art. 6), and rules for the mutual rendition of fugitive subjects were laid down (arts. 2 and 7-10). Subsequently in 1768, a supplementary extradition treaty was agreed upon,⁵ and in 1792 a protocol was signed,⁶ regulating the trade at Kiachta and intercourse between Russians and Chinese on the frontier.

¹ Macgowan, 534.

² Treaties, I., 3-7. The document was drawn up in Latin and translated into French by Père Gerbillon and his associate, the Portuguese Jesuit Thomas Pereyra, who were appointed by the Chinese government to accompany its plenipotentiaries as interpreters to the contracting parties.—Mayers, 96.

³ Treaties, I., 9-17.

⁴ Williams, 91.

⁵ Treaties, I., 18-20.

⁶ *Ibid.*, xlvii-xlix.

Second Period, 1842-1855.

With the termination of the first Anglo-Chinese war China's conventional relations entered upon the second era, for at Nanking, on August 29, 1842, on board the British frigate *Cornwallis*, was concluded "the first 'Treaty of Peace, Friendship, and Commerce' to which the sign manual of China had ever been attached on the new footing of equality."¹ Its provisions² include the opening of five ports—Canton, Foochow, Amoy, Ningpo, and Shanghai—to British trade and residence, and the appointment of consular officers thereto as the medium of communication between the Chinese authorities and British merchants (art. 2). The island of Hongkong was ceded to Great Britain, "it being obviously necessary and desirable, that British subjects should have some port whereat they may careen and refit their ships, when required, and keep stores for that purpose" (art. 3). The Co-hong monopoly was to be abolished and there was to be complete freedom of trade (art. 5). The mode of correspondence and intercourse between the officials of the two nations was laid down (art. 11), and an indemnity of twenty-one million dollars³ was to be paid—six millions "as the value of opium which was delivered up at Canton in the month of March, 1839, as a ransom for the lives of Her Britannic Majesty's Superintendent and subjects" (art. 4);⁴ three millions "on account of debts due to British subjects by some of the said Hong merchants, who have become insolvent" (art. 5); and the balance as military expenses (art. 6). General regulations for trade were subsequently agreed upon and incorporated in the supplementary treaty of Hoomun Chai, October 8, 1843.⁵ These include a tariff schedule⁶ and the grant of extra-territoriality.⁷

¹ Lanning, 247.

² Treaties, I., 159-164.

³ Between four and five millions sterling.—Davis, II., 136.

⁴ "This treaty in no way legalised the opium trade between India and China, but the article quoted undoubtedly is the justification for calling the war which preceded the signing of that treaty, 'The Opium War,' for, by compelling the Chinese government to pay for contraband opium which had been destroyed by the Chinese commissioner Lin, it was an official recognition on the part of the British government that opium might be trafficked in, and, in the event of seizure and destruction China would have to make compensation."—Dr. Hamilton Wright, in 3 Am. J. Int. Law (1909), Supplement, 253-276.

⁵ Treaties, I., 191-207.

⁶ *Ibid.*, 167-190. "Our existing tea duty, amounting to an impost of at least 200% on the chief article of commerce with a country whose highest tax on our trade does not exceed 5%, is not only an act of national injustice towards China, but a standing exception and contradiction to the principles and practice of free trade"—Davis, II., 108.

⁷ Art. 13, General Regulations.

The first general treaty of friendship, commerce and navigation unheralded by the intervention of hostilities, was the treaty of Wanghia, concluded with the United States, on July 3, 1844.¹ France came next with the treaty of Whampoa, October 24, 1844.² These followed in the main the line of the British treaties,³ the principal addition being the stipulation for a treaty revision twelve years after the exchange of ratifications. Soon after Belgium obtained the requisite permission to trade, the instrument taking the form of a viceregal letter, dated July 25, 1845, in which were enclosed copies of the treaties with Great Britain, the United States and France, and an imperial decree granting the same on those terms.⁴ Sweden and Norway followed two years later, their treaty of Canton, March 20, 1847,⁵ being a virtual reproduction of the American counterpart.

Most-Favoured-Nation Clause. The "precious little" most-favoured-nation clause first appeared in the supplementary treaty of Hoo-mun Chai, Article VIII of which reads as follows:—“(The Emperor of China having been graciously pleased to grant to all foreign countries whose subjects, or citizens, have hitherto traded at Canton, the privilege of resorting for purposes of trade to the other four ports of Foochow, Amoy, Ningpo and Shanghai, on the same terms as the English, it is further agreed that should the Emperor *hereafter*, from any cause whatever, be pleased to grant additional privileges or immunities to any of the subjects or citizens of such foreign countries, the same privileges and immunities will be extended to and enjoyed by British subjects; but it is to be understood that demands or requests are not, on this plea, to be unnecessarily brought forward.”⁶) Four years subsequently the above clause was invoked, Article V of the agreement of April 6, 1847, relative to the entrance of British subjects into the city of Canton, providing that “according to the American and French treaties, the building of

¹ Treaties, I., 473-508.

² *Ibid.*, 559-601.

³ “It is due to the Chinese government to say that this grant of trade to all nations upon equal terms was an inspiration of its own sense of justice, as neither the emperor nor his commissioner had any knowledge of the rule of international law,—‘the most favoured nation,’—at that day even imperfectly observed by the Christian governments.”—Foster, 77.

⁴ Treaties, II., 747.

⁵ *Ibid.*, 797-847. After the dissolution between Sweden and Norway, the former concluded a fresh treaty (Peking, July 2, 1908) with China. For text and additional article of May 24, 1909, see 101 State Papers, 945-952.

⁶ Treaties, I., 201. Art. 54 of the Tientsin treaty (*infra*) extended the grant to include advantages “that *may have been or may be hereafter granted*” by China to other nations.

churches in the five ports is conceded, and it is therefore agreed upon that a spot in the neighbourhood of the foreign factories, outside of them, may be rented for erecting one.”¹

Third Period. The treaties² signed at Tientsin, in 1858, with 1856-1858. Russia (June 13), the United States (June 18), Great Britain (June 26), and France (June 27), attempted for the second time to arrive at a satisfactory settlement.³ With the exception of the Russian treaty, half of which was adjunctive of the treaties of Kuldja, July 25, 1851, and Aigun, May 16, 1858⁴ (relative to delimitation and frontier-trade matters), the other three closely resembled one another. The existing treaties were recast; a new tariff was drawn up;⁵ the trade in opium was legalised;⁶ navigation along the Yangtse river was allowed;⁷ additional ports were opened to foreign trade and residence; the passport system for inland trade and travel was inaugurated; the toleration of the Christian religion was sanctioned;⁸ and the residence of diplomatic representatives at Peking was conceded.

Fourth Period, 1859-1860. According to the British and French treaties, the ratifications of the above conventions were to be exchanged at Peking within one year of the signature thereof. For this purpose the Anglo-French forces the following year put into Taku, intending to ascend the Pei-ho river and reach Peking by way of Tientsin. The Chinese offered to conduct the allied plenipotentiaries thither by way of Pehtang, a landing-place a few miles further north.⁹ The latter, however, insisted on adhering to their original intention. They attempted to storm the river defences, but were repulsed. Thus commenced the third Anglo-Chinese or second

¹ Treaties, I., 210.

² *Ibid.*, 29-35; 509-524; 212-237, 243-274; 602-672 respectively.

³ The hostilities which had preceded these treaties were confined to Great Britain and France, the former to exact reparation for the *Arrow* incident, and the latter, for the death of a missionary.—Walrond, 177, 209; Foster, 224; McCarthy, 164-165.

⁴ Treaties, I., 21-26, 27-28 respectively.

⁵ Shanghai agreement, Nov. 8, 1858, Rules of Trade.

⁶ *Ibid.*, Rule 5, “regarding certain commodities heretofore contraband,” paragraph 1.

⁷ Art. 10, British. This stipulation is not mentioned in the other conventions.

⁸ This is a formal recognition of what was already granted in 1844 to France after the signature of the Whampoa treaty.—Davis, II., 222-228; Eames, 551-553; Martin, 182.

⁹ The Russian and American treaties were silent as to the place for the exchange of ratifications, so the formality was effected at Peking and Pehtang.—Williams, 316-318; Foster, 248-252; Martin, 195-202; Morse, 577-582.

Franco-Chinese war.¹ The convention which restored friendly relations, was signed at Peking, in 1860 (British, Oct. 24; French, Oct. 25).² The Chinese government expressed its "deep regret" for the Taku "misunderstanding" and reconfirmed the Tientsin provision for the residence of foreign ministers in the capital. It ceded to Great Britain (art. 6) that portion of the township of Kowloon which had previously been leased in perpetuity, as a dependency of Hongkong; and engaged itself (art. 6, French convention) to make indemnification for "all such churches, schools, cemeteries, lands, and buildings as were owned on former occasions" by Roman Catholic Christians, but the money was to be handed to the French representative at Peking for transmission to the missionaries in the localities concerned.³

Fifth Period, During the next score of years the following states entered into treaty relations with China:—⁴ Germany (Tientsin, September 2, 1861); Portugal (Tientsin, August 13, 1862); Denmark (Tientsin, July 13, 1863); the Netherlands (Tientsin, October 6, 1863); Spain (Tientsin, October 10, 1864); Italy (Peking, October 26, 1866); Austria-Hungary (Peking, September 2, 1869); Japan (Tientsin, September 13, 1871); Peru (Tientsin, June 26, 1874); and Brazil (Tientsin, October 3, 1881). With a few modifications, these late-comers followed the principles laid down by their predecessors.

The Portuguese treaty was not ratified; it was, however, revived in the Peking convention of December 1, 1887,⁵ whereby Macao was ceded in perpetuity to Portugal (art. 2), in return for the latter's engagement "to co-operate with China in the collection of duties on opium exported from Macao into Chinese ports, in the same way, and as long as England co-operates with China in the collection of duties on opium exported from Hongkong into Chinese ports" (art. 4).

¹ "The Chinese were accused of bringing it about by treachery. But were they wrong in barring the way to a city that was not opened by treaty?"—Martin, 193.

² Treaties, I., 238-242; 673-678 respectively.

³ "We must suppose a French army entering London and there dictating the conditions of peace, and among others one that all church property confiscated by Henry VIII should forthwith be restored to the Roman Catholic church by the present holders, however acquired, and without compensation, and that the French government should be appealed to in order to enforce the vigorous execution of the stipulation."—Sir Rutherford Alcock, cited in Brinkley, XII., 112-113.

⁴ Treaties, II., 851-927; 987-1008; 1043-1065; 1069-1081; 1085-1114; 1129-1179; 1183-1230; 1235-1312; 1474-1483; 1439-1499 respectively.

⁵ *Ibid.*, 1010-1033.

Emigration. In addition to its treaty of friendship, commerce and navigation, Peru concluded on the same date a special convention relative to Chinese immigration;¹ "in view of the representations that have been made to the effect that some of these are suffering grievances," the Chinese government could despatch a commission to "institute a thorough investigation into the condition of Chinese immigrants in all parts of Peru," and the latter government would give the mission "the fullest assistance in the fulfilment of its duties."² Three years subsequently a kindred agreement was signed at Peking, on November 17, 1877,³ between China and Spain, the two governments "being very desirous to establish on a new basis the emigration of Chinese subjects to the island of Cuba, and in order to avoid any further complication which might hereafter arise."³

Burlingame Treaty.

The Sino-American treaty of Washington, July 28, 1868, is a noteworthy document.⁴ It declares China's right of eminent domain or dominion over its lands and waters (art. 1); it sets forth the rights of Chinese residents in the United States (articles 4 and 7); it recognises "the inherent, inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to another, for purposes of curiosity, of trade, or as permanent residents," and binds both governments "to pass laws making it a penal offence for a citizen of the United States or Chinese subject to take Chinese subjects either to the United States or to any other foreign country (or vice versa) without their free and voluntary consent" (art. 5). "The United States, always disclaiming and discouraging all practices of unnecessary dictation and intervention by one nation in the affairs or domestic administration of another, do hereby freely disclaim and disavow any intention or right to intervene in the domestic administration of China in regard to the construction of railroads, telegraphs, or other material internal improvements;" if, however, hereafter, China shall determine upon executing such

¹ Treaties, II., 1471-1473. See 102 State Papers, 394-396, for the new protocol of Lima, Aug. 28, 1909.

² In proof of its sincerity the Peruvian government "will compel the employers of Chinese immigrants whose contracts have expired, and in which it may have been stipulated that they shall be sent back to China, to provide them with passages back to their native country if they be desirous of returning to China;" and likewise where "no stipulation is made for the return passage on the expiry of the contracts, and provided that the immigrants shall express a wish to return to China but shall be without the means of providing their own passage, the Peruvian government will cause them to be repatriated gratuitously in the ships which leave Peru for China."

³ Treaties, II., 1115-1125.

⁴ Treaties, I., 525-531.

undertakings "and shall make application to the United States or any other Western power for facilities to carry out that policy, the United States will in that case designate and authorise suitable engineers to be employed by the Chinese government, and will recommend to other nations an equal compliance with such applications, the Chinese government in that case protecting such engineers in their persons and property, and paying them a reasonable compensation for their services" (art. 8).

United States, 1880. Twelve years later two further conventions were concluded at Peking, on November 17, 1880, the first regulating Chinese immigration into the United States,¹ and the second concerning commercial intercourse between the two nations.² The former provides in the preamble that, "whereas the government of the United States, because of the constantly increasing immigration of Chinese labourers to the territory of the United States, and the embarrassments consequent upon immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit;" therefore, "whenever in the opinion of the government of the United States, the coming of Chinese labourers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it" (art. 1).³ In return, it was mutually agreed in the latter treaty that "Chinese subjects shall not be permitted to import opium into any of the ports of the United States; and citizens of the United States shall not be permitted to import opium into any of the open ports of China, to transport it from one open port to any other open port, or to buy and sell opium in any of the open ports of China" (art. 2).⁴ Accordingly, "this absolute prohibition, which extends to vessels owned by the citizens or subjects of either power, to foreign vessels employed by them, or to vessels owned by the citizens or subjects of either power and employed by other persons for the transportation of opium, shall be enforced by appropriate legislation on the part of China and the United States; and the benefits of the

¹ Malloy, I., 237-239.

² *Ibid.*, 239-241; Treaties, I., 532-535.

³ The treaty of March 17, 1894, however, stipulated that such labourers might be prohibited from admission into the United States for a term of ten years.—Malloy, I., 241-243. This was however terminated on Dec. 7, 1904.—Foster, 299-306.

⁴ As against the Americans this stipulation was substantially enacted in Art. 33 of the 1844 treaty, but relaxed in the 1858 Shanghai agreement.

favoured-nation clause in existing treaties shall not be claimed by the citizens or subjects of either power as against the provisions of this Article."

Japan, Great Britain and Russia, 1874-1881. During the decade following the Franco-German war the relations between China and Japan, Great Britain, and Russia became strained; happily, however, the Japanese agreement of Peking, October 31, 1874,¹ the British convention of Chefoo, September 13, 1876,² and the treaty of Petrograd, February 24, 1881,³ were concluded. In the first, China was to pay to the Japanese government a sum of five hundred thousand taels for the murder of its subjects by the "unreclaimed savages of Formosa"—one-fifth as compensation for the families of the shipwrecked sailors, and four-fifths as expenses of the latter's punitive expedition.⁴ In the Chefoo agreement the Chinese government agreed to pay on demand an indemnity of two hundred thousand taels, "on account of the families of the officers and others killed in Yunnan;⁵ on account of the expenses which the Yunnan case has occasioned; and on account of claims of British merchants" (sec. I, art. 5). Moreover an expiatory mission was to be despatched to England, the text of the imperial letter of regret to be first communicated to the British minister (*ibid.*, art. 6). New provisions for official intercourse and judicial procedure were agreed upon (sec. II), and revised regulations for trading were laid down (sec. III).

During the Mohammedan rebellion the dominion of Ili was "temporarily occupied" by the Russian armies. This territory the Czar's government now consented to restore to the Chinese government. In return the latter engaged to pay the sum of nine million roubles (£1,431,664. 2s.) to cover the expenses of occupation since 1871, and "to satisfy all the pecuniary claims arising from the losses which Russian subjects have suffered in their goods pillaged on Chinese territories" (art. 6). A portion of the frontier was redelimited (arts. 7-8),⁶ and commercial privileges formerly granted to Russia in regions adjoining

¹ Treaties, II., 1313-1315.

² Treaties, I., 308-313.

³ *Ibid.*, 72-93.

⁴ In the agreement is embodied an acknowledgment by the two governments of their indebtedness to the British minister, Sir Thomas Wade, for his friendly mediation in the controversy.

⁵ This is generally known as the Margary affair.

⁶ The latest frontier convention between the two states is that of Tsitsikar, Dec. 20, 1911, which also provides for navigation along the Argun and Amur rivers.—104 State Papers, 883-890.

thereto, were either confirmed or extended and their regulations revised (arts. 10-18).¹

Sixth Period, 1884-1895. Beginning with 1884 and for the next ten years, China signed away four of her dependencies. In the Tientsin convention of May 11, 1884,² terminating the conflicts between the two countries in respect of the Annamese **Annam.** question, France engages "to respect and to protect against the aggressions of any nation whatever, and in all circumstances, the southern frontiers of China bordering on Tongking" (art. 1); whereupon China engages to withdraw immediately her frontier garrisons. On the one hand, the latter will respect henceforth all treaties concluded between France and the Court of Huc (art. 2); and on the other, in the drawing up of such treaties, the former will "not employ any expression in the nature of an impairment of the prestige of the Celestial Empire" (art. 4). Hostilities having recommenced owing to a misunderstanding between the two frontier forces, friendly relations were restored at Tientsin, by the Li-Patenôtre treaty of June 9, 1885.³ The previous stipulations concerning the relations between Annam and China, on the one hand, and Annam and France, on the other, were reconfirmed (arts. 1-2), and rules governing frontier trade and other matters were established (arts. 4-6). In application of Article VIII of the Burlingame treaty, Article VII provides thus:—"When China shall decide to construct railroads, it is understood that she will apply to French capitalists, and the government of the Republic will furnish all facilities for the procuring in France of the requisite personnel and labour. It is also understood that this clause is not to be considered as constituting an exclusive privilege in favour of France." The "exclusive privilege" clause was, however, modified in the supplementary commercial convention of Peking, June 20, 1895,⁴ as follows:—"It is understood that China, for the exploitation of its mines in the provinces of Yunnan, Kuangsi and Kuangtung, will first apply to French capitalists and engineers, but such operations are to be bound by the mining regulations enacted by the imperial government. It is moreover agreed that the Annamese railways, whether already existing or to be constructed, may after mutual agreement and in accordance with the conditions to be hereafter defined, be extended into Chinese territory" (art. 5).

¹ In pursuance of art. 18, the Peking agreement of Aug. 9, 1910, respecting navigation along the Sungari river was concluded.

² Treaties, I., 682-684.

³ *Ibid.*, 689-700.

⁴ *Ibid.*, 725-729.

Burma. The Burma-Tibet convention of Peking, July 24, 1886, and the Sikkim-Tibet agreement of Calcutta, March 17, 1890,¹ are similar in their nature. In the first, "inasmuch as it has been the practice of Burma to send decennial missions to present articles of local produce, England agrees that the highest authority in Burma shall send the customary decennial missions, the members of the mission to be of Burmese race" (art. 1); and "China agrees that in all matters whatsoever appertaining to the authority and rule which England is now exercising in Burma, England shall be free to do whatever she deems fit and proper" (art. 2). In the second convention, "it is admitted that the British government, whose protectorate over the Sikkim State is hereby recognised, has direct and exclusive control over the internal administration and foreign relations of that state, and, except through and with the permission of the British government, neither the Ruler of the State nor any of its officers shall have official relations of any kind, formal or informal, with any other country" (art. 2).² Four years later (March 1, 1894),³ Great Britain "agrees to renounce in favour of China for ever, all the suzerain rights in and over the States of Munglem and Kiang Hung—with the sole proviso that His Majesty the Emperor of China shall not, without previously coming to an agreement with Her Britannic Majesty, cede either Munglem or Kiang Hung, or any portion thereof, to any other nation" (art. 5). In the following year (June 20, 1895), a portion of Kiang Hung was ceded to France. Therefore in the Peking agreement of February 4, 1897,⁴ it was agreed that in the whole of the area south of the Namwan River, near Namkhai, "China shall not exercise any jurisdiction or authority whatever. The administration and control will be entirely conducted by the British government, who will hold it on a perpetual lease from China, paying a rent for it, the amount of which shall be fixed hereafter" (art. 2). Article V of the above French convention was invoked, and "the Chinese government agrees hereafter to consider whether the conditions of trade justify the construction of railways in Yunnan, and in the event of their construction agrees to connect them with the Burmese lines" (art. 12).⁵

¹ *Ibid.*, 314-316, 321-323 respectively.

² See *ibid.*, 324-327, for the Darjeeling regulations of Dec. 5, 1893, regarding trade, communication, and pasturage to be appended hereto.

³ *Ibid.*, 328-339.

⁴ *Ibid.*, 340-346.

⁵ See *infra*, § 74.

Korea. The Shimonoseki treaty of April 17, 1895,¹ terminated the hostilities between China and Japan. "China recognises definitely the full and complete independence and autonomy of Korea, and, in consequence, the payment of tribute and performance of ceremonies and formalities by Korea to China, in derogation of such independence and autonomy, shall wholly cease for the future" (art.1).²

Formosa. The southern portion of the Liaotung peninsula as well as the islands of Formosa and the Pescadores group were ceded to Japan (art. 2), and an indemnity of two hundred million Kuping taels was to be paid.³ New commercial privileges were granted, and these were confirmed or extended by the Peking treaty of commerce and navigation of July 21, 1896, as well as protocol of October 19, 1896,⁴ respecting Japanese settlements in the treaty ports.

Seventh Period, 1896-1901. The period extending for half a decade from 1896 to 1901 includes agreements to which the term of "treaty relations" must perforce be applied. It was the era not only of territorial leases,⁵ but also of the "scramble" for railway and mining concessions⁶ and their attendant loans.⁷ The gathering storm finally broke, and the "midsummer madness of 1900" was enacted.⁸ Then the international protocol of Peking, September 7, 1901, was concluded.⁹

International Protocol, 1901. Condign punishment was meted out to the principal authors of the "Boxer" outrages (art. 2); expiatory missions were to be despatched to Berlin and Tokyo, and a commemorative monument was to be erected at Peking to the memory of the German representative, Baron von Kettler (arts. 1 and 3). The importation into China of arms and ammunition, as well as materials for their manufacture, was prohibited for a term of two years, or more "in case of necessity recognised by the powers" (art. 5); and the forts

¹ Treaties, II., 1318-1326.

² See *ibid.*, 1538-1550, for the Sino-Korean treaty of commerce and navigation, 1899, which *ipso facto* ceased to operate with the annexation of the latter in August, 1910, by Japan.

³ Upon the joint representations of Russia, France and Germany, Japan retroceded the Liaotung peninsula, and China agreed to pay an additional indemnity of thirty million taels. See Rockhill, 26-27, for the Peking convention of Nov. 8, 1895.

⁴ Treaties, II., 1332-1342, 1343-1344 respectively.

⁵ *Infra*, § 20.

⁶ *Infra*, §§ 73, 77.

⁷ *Infra*, §§ 80-81.

⁸ "Misguided, ill-conceived, suicidal though it was, there can be no doubt either that the Boxer rising was a real national movement or that it was provoked by real grievances."—Douglas, 470; Macgowan, 614.

⁹ Treaties, I., 111-149; Rockhill, 63-97.

of Taku and those which might impede free communication between Peking and the sea, were to be razed (art. 8). The foreign legation quarter could be made defensible (art. 7), and certain points were to be garrisoned by foreign troops for the maintenance of open communication between the capital and the sea (art. 9). The existing treaties of commerce and navigation were to be revised, and the courses of the Peiho and the Whangpoo rivers were to be improved (art. 11).¹ The Foreign Office was to be reorganised and the amended audience ceremonial was to be acted upon (art. 12). Finally, an indemnity of four hundred and fifty million Haikwan taels (£67,500,000) was to be paid in gold in thirty-nine years, with annual interest thereon at 4% (art. 6).²

Mexico. At this period Mexico (Washington, December 14, 1899)³ fell into line with the other powers and also concluded a treaty with China⁴.

Eighth Period, 1902 et seq. The British commercial treaty of Shanghai, September 5, 1902,⁵ heralded the advent of restoration and reconstruction.⁶ As it was concluded in pursuance of Article XI of the 1901 protocol, various commercial privileges were conceded. In return, Great Britain agreed to give China every assistance in her efforts to reform her judicial system, and to relinquish her extraterritorial rights when those reforms should have proved satisfactory (art. 12).
Great Britain, United States and Japan. The United States and Japan soon followed, their Shanghai agreements of October 8, 1903,⁷ closely resembling the

¹ The regulations of Annex No. 17 have been replaced by the conservancy agreement of Sept. 27, 1905, in *Treaties*, I., 150-154.

² "The powers had exacted harsh terms, driven a hard bargain—too hard, doubtless."—William R. Manning, in 4 *Am. J. Int. Law* (1910), 864. According to the amortisation plan annexed thereto, the amount of principal and interest payable by 1940 would have totalled Hk. Tls. 982,238,150 (£147,335,722). For the respective shares of the different powers, see the protocol of June 14, 1902, in 26 *Commercial Treaties*, 53-54. Of its share of \$24,440,778.81 the United States in 1908 waived its claim to \$11,885,286.12, and this sum the Chinese government has set aside for the education of its students in that country.—60th Cong. 2nd sess. House Documents No. 1275, 1-11; *The East in the West*, April, 1915, 72.

³ *Treaties*, II., 1507-1517.

⁴ See *ibid.*, 1503, for the Congo treaty of 1898 which, consisting of only two articles, remained unratified up to the date of its annexation by Belgium in 1907.

⁵ *Treaties*, I., 351-376.

⁶ Here "Great Britain showed unmistakable signs that she was fully aware that the China of the future would be a new China, a China with whom it would be possible to treat as one power treats with another power in the West."—Lanning, 254.

⁷ *Treaties*, I., 536-554, and II., 1345-1351 respectively.

Mackay convention¹ and faithfully reproducing Article XII summarised above.²

Japan: South Manchuria. During the next few years China's treaty relations were principally with Japan, Russia and Great Britain. In the Manchurian convention of Peking, December 22, 1905,³ the Chinese government formally assented to all the transfers which Russia had made to Japan under Articles V and VI of the Portsmouth treaty (art. 1); and the assignee agreed "to observe as much as possible the existing treaties, in regard to the lease of land and the construction of railways," which had been concluded between the assignor and the superior landlord. "In case of any question arising in future, the Japanese government will consult with the Chinese government before settlement" (art. 2).⁴ Differences of opinion soon after arose between the two governments in respect of the Chientao boundary and the construction of railways in Manchuria, when these and other matters were settled by the two Peking conventions of September 4, 1909.⁵ In the second instrument the question of railway extensions and connections was conceded in favour of Japan.⁶ In the first the boundary dispute was settled in favour of China, Article IV of which provides that "the Korean subjects residing on agricultural lands within the mixed residence district to the north of the (boundary) river Tumen shall submit to the laws of China, and shall be amenable to the jurisdiction of the Chinese local officials."

¹ This is so called from Sir James Mackay, the British plenipotentiary.

² Articles 15 and 11 respectively.

³ Treaties, II., 1364-1369.

⁴ The annexed supplementary articles provide for new commercial privileges, including the formation of a Sino-Japanese joint-stock lumber company and the transformation of the Antung-Mukden railway from a military into a line for the transmission of the merchandise of all nations, the same to be administered by Japan for a period of fifteen years. The subject of railways was continued in the agreements of 1907 and 1908, and that of timber in the Yalu forestry agreement of May 14, 1908.—101 State Papers, 275-277; For. Rel., 1908, 502-503. For the agreement of Nov. 2, 1911, regulating through railway traffic across the Korean frontier, see 104 State Papers, 876-877. In Art. 7 of the second treaty concluded at Peking on May 25, 1915 (*infra*, appendix B), the Chinese government agreed to revise the Kirin-Changchun railway loan agreement on the basis of the provisions of the existing agreements between China and foreign financiers.

⁵ 102 State Papers, 391-394.

⁶ Art. 3 concedes to Japan the right of working coal mines at Fushun and Yuentai, the Japanese government "respecting the full sovereignty of China" and engaging "to pay to the Chinese government tax upon coals produced in those mines."

Kiaochow. Six months after the reduction of Tsingtau by the Anglo-Japanese forces, the treaties of Peking, May 25, 1915, were concluded.¹ On the one hand, the Chinese government "agrees to give full assent to all matters upon which the Japanese government may hereafter agree with the German government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the province of Shantung" (art. 1).² On the other hand, after the termination of the present European war, the Japanese government "will restore the said leased territory to China under the following conditions:—1. The whole of Kiaochow Bay to be opened as a commercial port. 2. A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese government. 3. If the foreign powers desire it, an international settlement may be established."

Russia: Rail-way Municipalities. About this time a dispute with Russia arose over the interpretation of the 1896 agreement for the construction and working of the Chinese Eastern railway. Russia attempted to exercise exclusive jurisdiction over both Chinese and foreigners at Harbin and other places within the railway zone, but China refused to recognise its regulations.³ The matter was afterwards settled by the Peking agreement of May 10, 1909,⁴ Russia acknowledging China's sovereignty and the latter consenting to the institution of mixed municipalities. Articles I and II provide as follows:—

"As a fundamental principle, the sovereign rights of China on the lands of the railway are recognised; any prejudice to the contrary notwithstanding. China shall adopt whatever measures are in consonance with her sovereign rights within the territory of the railway zone. Neither the railway administration nor the municipalities shall under any pretext oppose these measures, if the same do not conflict with the provisions of the contracts concluded with the Chinese Eastern Railway Company."

¹ *Infra*, appendix B. On Jan. 18, 1915, the Japanese minister at Peking presented to the President of the Chinese Republic a list of twenty-one demands. On May 7 the Japanese ultimatum was delivered, on the next day the Chinese government complied; hence these treaties. Cf. China's Official History (in English) of the Recent Sino-Japanese Treaties (1915).

² The German garrison having capitulated to the joint forces of Great Britain and Japan, this article will no doubt be reviewed at the post-bellum peace conference.

³ The Chinese protest was supported by the United States. For. Rel., 1910, 202-231.

⁴ 102 State Papers, 396-399.

Outer Mongolia.

During the Chinese Revolution of 1911-1912 Outer Mongolia declared its independence. Russia having in the meanwhile recognised its stateship,¹ notes were exchanged on November 3, 1913, between the Peking and Petrograd governments in respect of its status.² Subsequently at Kiachta, on June 7, 1915, the Sino-Russo-Mongolian agreement was concluded.³ "Outer Mongolia recognises China's suzerainty. China and Russia recognise the autonomy of Outer Mongolia forming part of Chinese territory" (art. 2). "Autonomous Mongolia has no right to conclude international treaties with foreign powers respecting political and territorial questions;" such questions are to form the subject of consultation between Russia and China in accordance with Article II of their notes of 1913 (art. 3). China and Russia "recognise the exclusive right of the autonomous government of Outer Mongolia to attend to all the affairs of its internal administration and to conclude with foreign powers international treaties and agreements respecting questions of a commercial and industrial nature concerning autonomous Mongolia" (art. 5); at the same time, they "engage not to interfere in the system of autonomous internal administration existing in Outer Mongolia" (art. 6). To determine the relative positions of China and Russia in Outer Mongolia, Articles VII, VIII and IX provide that the military escort of the Chinese representative at Urga is not to exceed two hundred men, whereas the consular guard of the Russian representative is not to exceed one hundred and fifty; and "on all ceremonial or official occasions the first place of honour is due to the Chinese dignitary." In conformity with Article XVII the contracting parties have since at Urga, on January 26, 1916, drawn up a tripartite agreement,⁴ which provided for the transfer to Outer Mongolia of the section of the Kalgan-Urga-Kiachta telegraphic line lying within its borders.

Great Britain: The regulations provided by Article V of the **Emigration.** Peking convention, 1860, permitting Chinese to emigrate to British colonies, not having been framed, the two governments met at London (May 13, 1904),⁵ and agreed upon the regulations for the protection of such emigrants. "Whereas the

¹ China, 1913, No. 1: Despatches from the British ambassador at Petrograd, transmitting the Russo-Mongolian agreement and protocol of Nov. 3, 1912.

² Cf. Statesman's Year Book, 1916, 808.

³ The Far Eastern Review, June, 1915, 13-14. The Chinese text is published in the official treaty series volumes.

⁴ L. & C. Telegraph, Jan. 31, 1916.

⁵ Treaties, I., 451-459.

Tibet. refusal of Tibet to recognise the validity of or to carry into full effect the provisions of the Anglo-Chinese convention of March 17, 1890, and regulations of December 5, 1893, placed the British government under the necessity of taking steps to secure their rights and interests" thereunder, the Peking convention of April 27, 1906,¹ was agreed upon. The Anglo-Tibetan treaty of September 7, 1904, was annexed and confirmed, subject to present modifications (art. 1). Great Britain engages "not to annex Tibetan territory or to interfere in the administration of Tibet;" similarly, China also undertakes "not to permit any other foreign state to interfere with the territory or internal administration of Tibet" (art. 2).² The concessions mentioned in Article IX of the aforesaid Anglo-Tibetan instrument "are denied to any state or to the subject of any state other than China, but it has been arranged with China that at the trade marts specified . . . Great Britain shall be entitled to lay down telegraph lines connecting with India" (art. 3).³

Indian Opium. In recent years the trade in Indian opium constituted the principal subject of discussion between the two governments. In the Peking agreement of May 8, 1911,⁴ Great Britain, "recognising the sincerity of the Chinese government and their pronounced success in diminishing the production of opium in China during the past three years," was "prepared to continue the arrangement of 1907 for the unexpired period of seven years." The annual one-tenth diminution of production in China was to be *pari passu* with that of the export from India (art. 1). The Chinese government "have adopted a most rigorous policy for prohibiting the production, the transport and the smoking of native opium," and the British government "have expressed their agreement therewith and willingness to give every assistance" thereto. Accordingly, "with a view to facilitating the continuance of this work," the latter were prepared that the Indian export to China should cease "in less than seven years if clear proof is given of the complete absence of production of native opium in China" (art. 2).⁵

¹ *Ibid.*, 460-468.

² Recently these three governments met at Calcutta to determine anew their relative positions. The final protocol (July 3, 1914), was signed by Great Britain and Tibet, but China refused to be bound thereby.—*Statesman's Year Book*, 1916, 805.

³ Cf. Art. 16 of the London convention, Mar. 1, 1894, providing for telegraphic connection between the Chinese and Burmese systems; also the agreements of Sept. 6, 1894, and May 23, 1905, thereanent, in Hertslet, I., 110-113, 195-198 respectively.

⁴ British Treaty Series, 1911, No. 13.

⁵ Subsequently commencing from Apr. 1, 1913, the further exportation from India was stopped, but the stocks which had accumulated at the treaty ports were to be gradually "absorbed" into the interior of China.—52 Hansard Reports, 1913, III., col. 2183-2192.

Arbitration : United States. At Washington, on October 8, 1908,¹ China signed its first arbitration convention.² In pursuance of Article XIX of the convention for the pacific settlement of international disputes, concluded at The Hague, on July 29, 1899, China and the United States agreed to refer to the Permanent Court of Arbitration all "differences which may arise of legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which may not have been possible to settle by diplomacy . . . provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two contracting states, and do not concern the interests of third parties" (art. 1). These reservations were embodied in the similar convention

Brazil. with Brazil of Peking, August 3, 1909.³ But in the Washington treaty of September 15, 1914, for the advancement of peace,⁴ the American and Chinese governments agreed to submit "any disputes of whatever nature they may be", to a permanent international commission for investigation and report (art. 1). This stipulation was similarly embodied in the

Holland. arbitral convention of The Hague, June 1, 1915,⁵ concluded with the Netherlands, the two governments desiring "especially to consecrate the principle of obligatory arbitration in their mutual relations" (art. 1).

Dutch Consular, 1911. The Dutch consular convention of Peking, May 8, 1911,⁶ is a notable landmark in China's treaty relations with other states.⁷ Modelled after the consular agreement concluded between Japan and the Netherlands about the same time, it declares

¹ Malloy, I., 290-291; 101 State Papers, 952-953.

² Article 53 of the unratified 1862 Portuguese treaty reads as follows :—"It being possible, notwithstanding that there exist peace and amity, that in the future some question may arise which (the two contracting parties) cannot easily decide by common accord, it is hereby expressly stipulated that in such case each of the governments shall invite a minister of any of the foreign nations who have treaties with China to decide the question, and that in case these two ministers do not agree, a third one shall be named by them, with the accord of the two governments, whose decision shall be definitive." This engagement was, however, omitted from the 1887 agreement.

³ Hsuan-t'ung, I., No. 1; 103 State Papers, 385-386.

⁴ U.S. Treaty Series, No. 619. Cf. British Treaty Series, 1914, No. 16: Treaty between the United Kingdom and the United States with regard to the establishment of a peace commission.

⁵ *Infra*, appendix C.

⁶ Hsuan-t'ung, I., No. 4; 104 State Papers, 877-883. See also Staatsblad van het Koninkrijk der Nederlanden, No. 280, 3-22, for the French and Dutch texts.

⁷ The negotiations for such an agreement were broached as far back as 1891, but those for the present convention began only in 1908.

clearly the precise "rights, duties, powers, privileges, exemptions, and immunities" of Chinese consular officers functioning in Dutch colonies. During the period of negotiations the Netherlands government amended the bulk of its laws regulating the residence and movement of Chinese in the Dutch East Indies; so the question of the nationality of Chinese therein was then determined by an exchange of notes.¹ Whereas Dutch-born Chinese have **Chinese Nationality**, always been considered as Dutch subjects wherever they went, henceforth the application of the *jus soli* would be restricted to the event of such Dutch-born Chinese remaining under Dutch jurisdiction. On returning to, in the case of Chinese-born, or entering China, in the case of Dutch-born, the *jus sanguinis* or Chinese nationality of such persons would *ipso facto* revive. If they resided in other countries, they were free to elect their own allegiance.

Chile. The last to enter into conventional relations with China is the Republic of Chile. In London, February 18, 1915, was signed the treaty of amity between the two states, thus bringing the number of China's treaty powers up to eighteen. It provides for the appointment of diplomatic as well as consular officers in each other's territories and defines their rights and duties.

¹ The delay in the settlement of this question postponed for nearly a year the signature of the convention. The immediate occasion for the enactment of the new Chinese nationality law has been traced back to this controversy. "Toward the end of 1907 the Dutch government attempted to force naturalization upon Chinese residents in Java. The Chinese government knew that, as forced naturalization is, in the language of Oppenheim, an international delinquency, it might rely on diplomacy to prevent the execution of the Dutch scheme, but it also knew that the immediate promulgation of the nationality law was a necessity in that it would forestall the oft-repeated argument that 'China has not a proper nationality code wherewith to justify her claim to the allegiance of her subjects abroad.'"—Tsai Chu-tung, in 4 Am. J. Int. Law (1910), 407. The text of the law will be found in *ibid.*, supplement, 160-166.

PART I

TREATIES, CONVENTIONS, ETC., OF A POLITICAL CHARACTER

CHAPTER I

RIGHT OF INTERCOURSE

§ 1. FOOTING OF EQUALITY.

“The superior authorities of the United States and of China, in correspondence together, shall do so on terms of equality and in form of mutual communication (*chao-hui*). The consuls and the local officers, civil and military, in corresponding together shall likewise employ the style and form of mutual communication (*chao-hui*). When inferior officers of the one government address superior officers of the other, they shall do so in the style and form of memorial (*shén-ch'êng*). In no case shall any terms or style be used or suffered which shall be offensive or disrespectful to either party.”¹

At the threshold of our discussion we are confronted with a perplexing question of international ethics: How far has a state the right to hold itself aloof from its fellow states? In itself the problem is, perhaps, easy of solution;² but complications enter the moment we begin to analyse the situation. Up to the sixteenth century China consistently encouraged foreign intercourse; it was only when the new-comers had committed flagrant excesses against Chinese rights and property that it was compelled in self-defence to close its portals.³ Under these circumstances no critic can in fairness impugn the reasonableness of its action, especially when to-day so many Western states exercise the right of excluding aliens, whether undesirable or those of a particular race, from their territories.⁴ In practice, however, the matter has been settled in favour of unrestricted intercourse. The

¹ Art. 7, American 1858.

² Cf. Oppenheim, I., 199-201.

³ Cf. Koo, 21-31, 289-290; Morse, 41.

⁴ *Infra*, § 37.

makeshift policy of seclusion¹ was recognised as impracticable, and the principle embodied in the above stipulation now governs the mutual relations between China and other states as an equal among equals.

§ 2. RULES OF PROCEDURE.

At the Capital. "His Majesty the Emperor of China agrees to nominate one of the secretaries of state, or a president of one of the boards, as the higher officer with whom the ambassador, minister or other diplomatic agent of Her Majesty the Queen shall transact business, either personally or in writing, on a footing of perfect equality."²

The Foreign Office thus called into being was denominated the Tsung-li Ya-mên, until in pursuance of Article XII of the 1901 protocol, it was replaced by the Wai-wu Pu and, in emphasis of its importance, made to take precedence over all other government departments. With the establishment of the Republic in 1912, the term Wai-chiao Pu was adopted.³

In the Provinces. "Consuls and vice-consuls in charge shall rank with intendants of circuits; vice-consuls, acting vice-consuls, and interpreters with prefects. They shall have access to the official residences of these officers, and communicate with them, either personally, or in writing, on a footing of equality as the interests of the public service may require."⁴ The American treaty goes a step further by providing that, "if the officers of either government are disrespectfully treated or aggrieved in any way by the authorities of the other, they shall have the right to make representations of the same to the superior officers of their own government who shall see that full inquiry and strict justice be had in the premises. And the said consular officers of either nation shall carefully avoid all acts of offence to the officers and people of the other nation."⁵

¹ "That policy had, however, served a useful purpose both for Japan and China. Following the maritime discoveries of the 15th century, the commercial nations had shown an utter disregard of the proprietary rights of the people of the East.....In the 19th century a higher regard was beginning to be shown towards weaker nations, and these two empires could then with greater safety to their independence permit foreign intercourse."—Foster, 133-134.

² Art. 5, British 1858.

³ "From a literary point of view it is a change for the better, the substitution of the combination wai-chiao ('foreign relations') for wai-wu ('foreign things') removing any lack of dignity which may have attached to the latter phrase."—Sir John Jordan to Sir Edward Grey, in China, 1913, No. 3, 24.

⁴ Art. 7, British 1858.

⁵ Art. 2, American 1903.

**1880 Agree-
ment.**

In the protocol of December 10, 1880,¹ it was agreed, as regards personal interviews, that the high provincial authorities should similarly receive foreign officials, even though of inferior rank, with the forms and courtesy as observed between a host and his guest. The foreign diplomatic body suggested the term *wén-yi* in place of *shén-ch'êng*, but the amendment was not accepted by the Chinese government, on the ground that the above-quoted Article VII of the British treaty respecting the grading of officials, was "especially intended to indicate the conditions of relative rank."² In the end a compromise was effected as follows:—"While in ordinary official matters consuls shall continue to address the *taotai* in the *chao-hui* form, and the latter shall, on behalf of the consul, report (*chuan-shên*) to the governor-general or governor.... on all matters of importance, the form of correspondence shall, without reference to the rank of the parties, be the '*chao-hui*,' or communication."³ Thus to-day the *chao-hui*, or despatch, is the usual form of communication between all Chinese and foreign officials.⁴

**Question of
Text.**

"The English text of all notes or despatches from Swedish officials, and the Chinese text of all notes or despatches from Chinese officials, shall be authoritative."⁵ The original despatch may be accompanied by a translation, but the sense in the original text shall prevail.⁶ With a few exceptions,⁷ the foregoing represents the general rule. In the interpretation of treaties, however, different rules apply.⁸

§ 3. THE AUDIENCE CEREMONIAL.

**Footing of
Equality**

"His Majesty the Emperor of China hereby agrees that the ambassador, minister, or other diplomatic agent, so appointed by Her Majesty the Queen of Great Britain... shall not

¹ Hertslet, I., 80-83; For. Rel., 1881, pt. I., 219-222.

² When, in 1913, the *taotais* or intendants of circuits were temporarily substituted by "foreign affairs delegates," the British minister considered the appointment as one in violation of that article, because "while the *taotai* was an official having control over the government of the territory within his jurisdiction, the newly appointed foreign affairs delegates hold no such responsible position."—Sir John Jordan to Sir Edward Grey in China, 1914, No. 1, 14. No formal protest, however, appears to have been entered on the subject.

³ It was further agreed that thereafter, in communicating with consuls, Chinese officials were to use the expression *kuei ling shih* ("the honourable consul"), instead of *kai ling shih* ("the said consul").

⁴ Cf. Dr. W. W. Yen, in 3 Am. J. Int. Law (1909), 537-546.

⁵ Art. 2, Swedish 1908; art. 1, American 1903.

⁶ Art. 3, French 1858.

⁷ E.g. Art. 50, British 1858, stipulates that the English text shall be the correct sense, but is silent upon the question of despatches from Chinese officials.

⁸ *Infra*, §103.

be called upon to perform any ceremony derogatory to him as representing the Sovereign of an independent nation, on a footing of equality with that of China. On the other hand, he shall use the same forms of ceremony and respect to His Majesty the Emperor as are employed by the ambassadors, ministers, or diplomatic agents of Her Majesty towards the Sovereigns of independent and equal European nations."¹ The rules of procedure are as follows:—²

1. "When a representative of a power shall have occasion to present to His Majesty the Emperor his letters of credence or a communication from the Head of the State by whom he is accredited, the Emperor shall cause to be sent to the residence of said representative, to bear him to the palace, a sedan chair with yellow trimmings and tassels, such as are used by the princes of the imperial family. The said representative shall be taken back to his residence in the same manner. An escort of troops shall likewise be sent to the residence of said representative to accompany him going and returning.

2. "When presenting his letters of credence or communications . . . the diplomatic agent, while bearing said letters or communications, shall pass by the central openings of the palace doors until he has arrived in the presence of His Majesty. On returning from these audiences he will comply, as regards the doors by which he may have to pass, with the usages already established at the court of Peking for audiences given to foreign representatives.

3. "The Emperor shall receive directly into his hands the letters and communications above mentioned which the foreign representatives may have to hand to him.

4. "If His Majesty should decide upon inviting to a banquet the representatives of the powers, it is well understood that this banquet shall be given in one of the halls of the imperial palace and that His Majesty shall be present in person.

5. "In brief, the ceremonial adopted by China as regards foreign representatives shall, in no case, be different from that which results from perfect equality between the countries concerned and China, and without any loss of prestige on one side or the other."³

¹ Art. 3, British 1858.

² Rockhill, 95-96.

³ Cf. Art. 2, Swedish 1908. In illustration of the converse case, the incident of the expiatory mission to Berlin in 1901 (*supra*, 14) may be cited. The Chinese envoy was required to tender the regrets of his government in a kneeling posture, but he declined to comply. Finally the question of kneeling was waived and the threatened rupture between the two countries was averted. Bland and Backhouse, 238-240.

CHAPTER II

RIGHT OF REPRESENTATION

§ 4. RECIPROCITY OF RIGHT.

“For the better preservation of harmony in future, Her Majesty the Queen of Great Britain and His Majesty the Emperor of China mutually agree that, in accordance with the universal practice of great and friendly nations, Her Majesty the Queen may, if she see fit, appoint ambassadors, ministers, or other diplomatic agents to the court of Peking; and His Majesty the Emperor of China may, in like manner, if he see fit, appoint ambassadors, ministers, or other diplomatic agents, to the court of St. James’s.”¹

§ 5. DIPLOMATIC PRIVILEGES AND IMMUNITIES.

“His Majesty the Emperor of China hereby agrees that the ambassador, minister, or other diplomatic agent, so appointed by Her Majesty the Queen of Great Britain, may reside, with his family and establishment, permanently at the capital, or may visit it occasionally Her Majesty’s government may acquire at Peking a site for building, or may hire houses, for the accommodation of Her Majesty’s mission, and the Chinese government will assist it in so doing. Her Majesty’s representative shall be at liberty to choose his own servants and attendants, who shall not be subjected to any kind of molestation whatever. Any person guilty of disrespect or violence to Her Majesty’s representative, or to any member of his family or establishment, in deed or word, shall be severely punished. It is further agreed that no obstacle or difficulty shall be made to the free movements of Her Majesty’s representative, and that he, and the persons of his suite, may come and go, and travel at their pleasure. He shall, moreover, have full liberty to send and receive his correspondence to and from any point on the sea-coast that he may select; and his letters and effects shall be held sacred and inviolable. He may employ for their transmission special couriers who shall meet with the same protection and facilities for travelling as the persons employed in carrying despatches for the imperial government; and generally he shall enjoy the same privileges as are accorded to officers of the same rank by the usage and consent of Western nations. All

¹ Art. 2, British 1858.

expenses attending the diplomatic mission of Great Britain shall be borne by the British government.”¹

In return, “Her Majesty the Queen of Great Britain agrees that the privileges hereby secured shall be enjoyed in her dominions by the ambassadors, ministers or diplomatic agents of the Emperor of China accredited to the court of Her Majesty.”²

§ 6. PEKING LEGATIONS.

Legation “The quarter occupied by the legations shall be
Quarter and considered as one specially reserved for their use and
Guards. placed under their exclusive control, in which Chinese shall not have the right to reside and which may be made defensible. . . . In the protocol annexed to the letter of the 16th January, 1901, China recognised the right of each power to maintain a permanent guard in the said quarter for the defence of its legation.”³

Exclusive Oc- In the course of our discussion here is the first
cupation. derogation from China’s sovereignty. The stipulation has not only reduced the fiction of diplomatic extraterritoriality⁴ into a concrete fact, but it has also restricted the territorial sovereign’s rights over his own dominion. The effect of such exclusive occupation is apparent, and was recently illustrated. In the course of the southern rebellion of 1913 martial law was proclaimed at Peking. In endeavouring to safeguard itself against the complicity of foreign subjects with the insurrectionists, the Chinese government sought the co-operation of the diplomatic body. The Wai-chiao Pu

¹ Arts. 3-4, British 1858. The first declaration of its kind, this is also the fullest exposition of diplomatic prerogatives, privileges and immunities.

² Art. 6, British 1858. The first permanent Chinese representative to reside abroad was Kuo Sung-t’ao, head of the mission of apology to England provided for by the 1876 Chefoo convention. The earliest missions to go abroad, however, were those of Pin-chuin, 1866, and Burlingame, 1867. On the eve of his departure from Peking, the American minister, Anson Burlingame, was requested by the Chinese government to visit the different European capitals as its special envoy. He consented and while in the United States, succeeded in negotiating the Sino-American treaty of 1868. He also visited London, Paris, Berlin, and Petrograd, where he died.—Williams, Anson Burlingame; Martin, 372-376.

Chinese legations are to-day maintained in the following capitals:—Berlin, Brussels, London, Madrid, Paris, Petrograd, Rio de Janeiro, Rome, The Hague, Tokyo, Vienna, Washington; and *chargés d’affaires* in Copenhagen, Havana, Lisbon, and Mexico City. Cuba is not a treaty power, but in furtherance of the Sino-Spanish treaty of 1877 respecting Chinese emigration thereto (*supra*, 9), the two states appoint a *chargé* to each other’s capital.

³ Art. 7, 1901 protocol. The limits of this quarter as well as the areas of the different legations are defined in Annex No. 14.

⁴ Cf. Oppenheim, I., 460-461.

requested that (1) "violent characters should not be permitted to make use of the legation quarter as a refuge;" that (2) "letters and telegrams despatched from the legation quarter, other than those of the legations and the banks, should be subjected to official censorship by the Chinese;" and that (3) "foreign subjects residing outside the quarter should be held responsible for the observance of orders issued under martial law." In reply, the latter observed that "clause (1) was actually provided for by the protocol of 1901, no Chinese other than those in the employ of foreigners having the right to reside within the legation quarter; that clause (2) could not be accepted, but that code telegrams from commercial houses should be franked by the official seal of their legations during the period of disturbance; and that no measures could be taken to enforce clause (3) until the nature of the orders in question had been communicated by the Chinese government."¹

§ 7. INTERNATIONAL GARRISONS.

"The Chinese government has conceded the right to the powers . . . to occupy certain points, to be determined by an agreement between them for the maintenance of open communication between the capital and the sea."² In conjunction with the preceding Article VIII relative to the demolition of the Taku forts, this provision is designed for the protection of the legations in the event of a recrudescence of the "Boxer" outrages. In effect, however, it denies to the territorial sovereign the right of looking after the defence of his own capital, as any erection of forts for the protection of the capital will "impede free communication between Peking and the sea."³ The protocol itself mentions no date when the legation guards as well as international garrisons may be withdrawn,⁴ but it appears that their

¹ China, 1914, No. I, 46.

² Art. 9, 1901 protocol. The points specified are Huang-ts'un, Lang-fang, Yang-ts'un, Tien-tsin, Chün-liang Ch'êng, T'ong-ku, Lu-t'ai, T'ong-shan, Lan-chou, Ch'ang-li, Ch'in-wang Tao, and Shan-hai Kuan.

³ On the establishment of the Republic the southern provinces voted for a change of capital, but against this it was pointed out that the above stipulation would render either Nanking or Wuchang as well as the Yangtse river entirely open to the invader. Recently, however, it was reported that the Chinese General Staff was about to survey the neighbourhood of Peking in order to select suitable places for erecting fortifications. "It may fairly be assumed therefore that the foreign powers, whilst not perhaps explicitly diminishing by one jot the express terms of settlement, have tacitly let it be understood that they will not stand in the way of the proper defence of the capital."—National Review (Shanghai), Dec. 5, 1914.

⁴ See *infra*, § 66, for the opening of Peking to foreign trade on the withdrawal of such troops.

maintenance is conditional upon the powers' conception of the ability of China to afford the legations adequate protection.¹

§ 8. CONSULAR REPRESENTATION.

Foreign Consuls. "As China may appoint consular officers to reside in the United States and to enjoy there the same attributes, privileges and immunities as are enjoyed by consular officers of other nations, the United States may appoint, as its interests may require, consular officers to reside at the places in the Empire of China that are now or that may hereafter be opened to foreign residence and trade. They shall hold direct official intercourse and correspondence with the local officers of the Chinese government within their consular districts, either personally or in writing, as the case may require, on terms of equality and reciprocal respect. These officers shall be treated with due respect by all Chinese authorities, and they shall enjoy all the attributes, privileges and immunities, and exercise all the jurisdiction over their nationals which are or which may hereafter be extended to similar officers of the nation the most favoured in these respects. . . . On the arrival of a consul duly accredited at any place in China opened to foreign trade, it shall be the duty of the minister of the United States to inform the Board of Foreign Affairs, which shall, in accordance with international usage, forthwith cause the proper recognition of the said consul and grant him authority to act."² Such recognition, however, may be withdrawn "should it be found that the said consul has contravened international usage in the performance of his duties."³ The exequatur is to be issued free of charge.⁴

En Carrière Consuls. In many treaties it is expressly stipulated that the consular officers so appointed must be officials of the appointing government, not merchants or otherwise engaged in trade.⁵ Where there are no consuls appointed to a port, the interests of the state concerned may be entrusted to a friendly consul accredited thereto, and in the case of states requiring *en carrière* consuls, such friendly consuls must likewise not be merchants or otherwise engaged in trade.⁶ The rule of *en carrière* consuls is however not uniform,

¹ Of late years a few states have either withdrawn their troops or cut down their number. Russia, for example, proposed and effected such a withdrawal on Dec. 5, 1913.—Perry-Ayscough, 325.

² Art. 2, American 1903.

³ Art. 3, Swedish 1908; art. 3, Brazilian 1881.

⁴ *Ibid.*, and art. 3, Mexican 1899.

⁵ Art. 4, Peruvian 1874; art. 3, Brazilian 1881; art. 9, Portuguese 1887; art. 15, Dutch 1911.

⁶ *Ibid.*, and art. 6, Austrian 1869.

and much is left to the discretion of the appointing states; but it appears that upon proper recognition, all consuls are entitled to their customary privileges and attributes, however they may have been appointed or whatever their official status. In 1903, the Chefoo consular body attempted to exclude the merchant-consuls from its meetings. The American consul, Mr. Fowler, reported the matter to his minister, but was instructed not to support the resolution. This attitude was approved by Washington, and the Department of State observed as follows:—"All governments, however, appoint such officers as their commercial agents, and while these appointments may be at times the subject of abuse, the matter cannot be remedied except by a general agreement among the powers. . . . It would, therefore, seem that the attitude which Mr. Fowler and his colleagues, representing the great commercial powers, would wish to assume towards those consuls engaged in trade or professions and representing powers with minor interests (Holland, Sweden and Austria), is at variance with the accepted principles of international representation. It may be recalled that the Congress of Vienna decided that no question of wealth or political importance of a power gave to its diplomatic representative any right of precedence over his colleagues of the same rank in the diplomatic corps of the capital to which he is accredited."¹

Chinese Consuls.

The attributes, privileges and immunities to which Chinese consular officers residing abroad are entitled, are generally expressed as those enjoyed by similar officers of the most favoured nation. In the Sino-Dutch consular convention of May 8, 1911, such privileges and immunities are defined as "exemptions from all military services, military requisitions and billeting, pecuniary impositions in lieu of military service or personal taxation, as well as all general or municipal impositions of a personal character."² Such exemptions, however, are not applicable to "customs imposts or other indirect or real taxations;"³ and such exemptions excepted, the consuls are amenable to the local laws, whether civil or criminal.⁴ The consulate's archives and documents

¹ For. Rel., 1903, 82-84.

² Art. 15. The benefit of such exemptions is expressly denied to resident consular officers who are Dutch subjects, even though the local government has formally authorised them to act as such.

³ Art. 15. In the same article it is provided that such privileges, etc., shall likewise be enjoyed by consular officers who are *non carrière*, if the grant is reciprocated.

⁴ Art. 2. Articles 9 to 14 declare that the powers exercisable by these officers are jurisdiction in respect of operations connected with the salvage of shipwrecked Chinese vessels, jurisdiction over Chinese seamen or deserters, administration of deceased nationals' estates, attestation of documents, and the preservation of peace and order on board Chinese vessels.

are inviolable.¹ The consulate premises, however, shall afford no protection to criminals seeking asylum therein, but shall remain, together with their inmates, liable to the jurisdiction of the local courts.²

§ 9. GOOD OFFICES AND MEDIATION.

Treaty Provisions. "There shall be, as there has always been, peace and friendship" between the United States of America and China, and between their people respectively. "They shall not insult or oppress each other for any trifling cause, so as to produce an estrangement between them; and if any other nation should act unjustly or oppressively, the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feelings."³

The eventuality here contemplated being in the nature of an existing or threatened dispute, the mutual assistance to be rendered is, perhaps, more accurately described as the offer of mediation⁴ than that of good offices. It seems, however, that the language employed may be liberally construed so as to include the exercise of good offices in other matters respecting peace and friendship. Thus, although in the bulk the promised assistance was rendered in cases of conflict between one of the contracting parties and a third state,⁵ such assistance has also been extended to the protection of that party's interests in states where it has no diplomatic or consular officers. For example, to-day in most of the South and Central American republics with which China has no treaty relations, the protection of Chinese interests therein is entrusted to the diplomatic and consular officers of the United States.⁶

Hague Convention. The rendering of such assistance being an act of friendship, it is sometimes likewise given by states

¹ Art. 5.

² Art. 4.

³ Art. 1, American 1858.

⁴ Compare art. 2, Japanese 1871:—"Mutual assistance shall be rendered or mediation offered for the arrangement of the difficulty."

⁵ During the Sino-Japanese war the United States had charge of Chinese interests in Japan as well as those of Japan in China; and during the Russo-Japanese war the same government succeeded in localising the area of hostilities waged within Chinese territory.—For. Rel., 1894, 1904, *passim*.

⁶ The American officers so acting, however, cannot certify the fact of Chinese citizenship, which can only be done by a responsible Chinese official.—For. Rel., 1908, 61-63.

whose treaties contain no such stipulation.¹ Since, however, China and its treaty powers are all co-signatories of the Hague conventions, their relations will be regulated by the following provision:—"The contracting powers deem it expedient and desirable that one or more powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance. Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities. The exercise of this right can never be regarded by either of the parties at variance as an unfriendly act."²

§ 10. INTERNATIONAL ARBITRATION.

Treaty Provisions: "Any disputes arising between the government of the Republic of China and the government of the United States of America, of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the high contracting parties do not have recourse to arbitration, be submitted for investigation and report to a permanent international commission . . . The high contracting parties agree not to resort, with respect to each other, to any act of force during the investigation to be made by the commission and before its report is handed in."³

Sino-American. China and Holland "agree to refer to the Permanent Court of Arbitration all differences which may arise between them and which may not have been settled by diplomatic means, and similarly in the case of disputes which have their origin in events anterior to the conclusion of the present convention."⁴

Sino-Dutch. Here are two methods of referring disputes to an international tribunal. In the latter the contracting

¹ E.g. the mediation of the British minister in the Sino-Japanese controversy over the Formosan savages in 1874 (*supra*, 11). The protection of Chinese interests in South America, etc., was formerly entrusted to British officials; but as complaints were addressed to the Chinese minister at Washington, whereas redress could only be had through the British Foreign Office *via* the London legation, the plan was found to be cumbersome.—For. Rel., 1908, 60.

² Art. 3, convention I., 1907.—Higgins, 103. Accordingly, on the outbreak of the war in Europe, China offered its good offices in mediation. When this proved abortive, it attempted to enlist the co-operation of the United States and Japan in an endeavour to prevent the hostilities from being extended to the Far East.—North China Herald, Sept. 12, 1914.

³ Art. 1, American 1914. The treaty is to run for five years.

⁴ Art. 1, Dutch 1915 (*infra*, appendix C). Article 6, however, provides that questions which, according to the territorial laws of the two states, are to be adjudicated upon by the national courts, shall not be so referred until the national courts concerned shall have pronounced definitively thereupon, except in the case of a denial of justice.

parties bind themselves, by resorting to an arbitral court, to abide by its decision.¹ In the former no such understanding is directly implied; on the contrary, the parties thereto reserve the right to act independently on the subject-matter of the dispute after the report of the commission shall have been submitted.² In effect, however, it may be claimed that the same result is attainable in both cases;³ for, as regards the latter, "if two powers had been able to agree to constitute a commission of inquiry, they should be able to go further in the manifestation of their attachment to peace."⁴

Hague Convention. To refer to an arbitral tribunal or commission of inquiry "all differences which may arise between them" or "of whatever nature they may be," is a great stride in advance of the engagement to refer thereto all "differences which may arise of legal nature or relating to the interpretation of treaties . . . provided, nevertheless, that they do not affect the vital interests, the independence or the honour of the two contracting states, and do not concern the interests of third parties."⁵ Pending the conclusion, however, of conventions with the other treaty powers providing for obligatory arbitration, the stipulation for limited arbitration is admittedly a distinct landmark in the advancement of peace. Here again, the Hague conventions will apply as between China and such other treaty powers who are co-signatories thereto. The enactment is as follows:—"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognised by the contracting powers as the most effective, and at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the contracting powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit."⁶ Furthermore, "in disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able

¹ "Recourse to arbitration implies an engagement to submit loyally to the award."—Art. 37, Hague conventions, No. I, 1907. The convention is to run for periods of ten years, unless the same is "denounced" six months before the expiration of each period.

² Art. 5, American 1914.

³ The procedure for setting up the requisite machinery, etc., in both cases follows closely that outlined in Hague conventions, No. I, 1907.

⁴ Higgins, 170. The United States' reservation in this connexion may be due to the exigencies of its own constitution.

⁵ Art. 1, American 1908.

⁶ Art. 38, convention I, 1907.

to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.”¹

Arbitration and Extra-territoriality. In the case of China, difficulties concerning extraterritorial rights are pre-eminently a subject for arbitration under the “questions of a legal nature” clause. It appears that in the first draft of convention I, 1907, for the pacific settlement of international disputes, such rights were expressly excluded; upon the motion of China and other states similarly situated, supported by the United States, Germany and Russia, the provision was however deleted. “It may well be that extraterritoriality is a political question and, as far as it is not guaranteed by special treaties, may be excluded from the operation of the convention. And it may be also that the term ‘vital interests’ is elastic enough to embrace extraterritoriality and thus exclude controversies involving extraterritorial rights and privileges from the treaty. It is a fact, however, that these rights and privileges are not specifically exempted and China is rightly and properly treated on a plane of equality with the other members of the family of nations.”²

Ashmore Fishery Arbitration. As an illustration of pre-Hague arbitrations, the Sun Blue Fishery case in Swatow may be cited. This fishery having by force of circumstances passed from the possession of Dr. Ashmore, an American missionary who had purchased it in 1872 from its Chinese owner, it was agreed between the Chinese and American governments that the dispute should be arbitrated upon by the British and Dutch consuls of that port. The latter decided in favour of the claimant as follows: “In arriving at this decision we think we, on the one hand, have dealt fairly with the Chinese Government, for we argue that if Dr. Ashmore could get a rental of \$400 a year for the fishery ground, the Chinese Government will on receipt of the deeds be in a position to relet it for a like amount; we think on the other hand, that taking into consideration the nature of the property, we could not in fairness award Dr. Ashmore a larger amount than we have done, which amount, with the interest attainable upon investments of a kindred character in China, will always bring him in the amount of which he has been deprived, and at the same time cover all that can be fairly claimed. This amount of \$4,600 to be paid two months from to-day, the 24th May, 1884.”³

¹ Art. 9, *ibid.*

² James B. Scott, in 3 Am. J. Int. Law (1909), 167.

³ Moore, International Arbitrations, II., 1857-1859.

Obligatory

Arbitration. Finally, it is to be noted that, under these two conventions, in order to start the arbitral or inquisitorial machinery, it is not necessary for the two states always to be in agreement in the first instance. On the one hand each state may resort independently to the tribunal in question and entrust it with drawing up a *compromis*¹ or making a report. On the other hand the commission may, through its president, offer its services spontaneously to the contracting parties, and "acceptance of that offer declared by one of the two governments shall be sufficient to give jurisdiction of the case to the commission."² In this connexion the Hague conventions provide as follows:—"In case of dispute between two powers, one of them may always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration. The Bureau must at once inform the other power of the declaration."³ But "recourse cannot be had to the court if the other party declares that in his opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question."⁴ Compared with the latter, the American and Dutch stipulations are a signal gain for the cause of peace and humanity.

¹ Cf. Art. 53 (4), convention I, 1907. In the previous article a *compromis* is defined to mean a document clearly setting forth the subject of the dispute, the time allowed for appointing arbitrators, the form, order, and time in which the written evidence is to be handed in, and the amount of the sum which each party must deposit in advance to defray the expenses. If necessary, the *compromis* also defines the manner of appointing arbitrators, the special powers, if any, conferred on the tribunal, the place of meeting, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

² Art. 3, American 1914; art. 3, Dutch 1915.

³ Art. 43, convention I, 1907.

⁴ Art. 53 (1), *ibid.*

CHAPTER III

CONSULAR JURISDICTION AND EXTRATERRITORIALITY

§ 11. RULES GOVERNING THE EXERCISE OF JURISDICTION.

Our discussion has so far been confined to matters solely affecting the governments concerned; here, for the first time, we come upon a topic which intimately affects the interests of the subjects of such governments. To the lay mind these privileges, known as rights of extraterritoriality, assume an importance transcending that of all other grants; to the student of international law, they constitute a positive derogation from the inherent prerogatives of the territorial sovereign. Regarded from either point of view, the subject has limitations no less clearly demarcated than its extents.

Cases Concerning Aliens Only: To begin with, we will examine the rules governing the exercise of such rights of extraterritoriality. If the case concerns the aliens of one and the same nationality, then "all questions in regard to rights, whether of property or person," shall be subject to the jurisdiction of their own authorities.¹ But if the dispute affects the subjects of different nationalities, then it shall be regulated by the treaties existing between the various states, "without interference on the part of China."²

Mixed Cases: So much for cases arising among aliens themselves. In respect of mixed suits or actions between Chinese and foreigners the treaties provide as follows:—"A British subject having reason to complain of a Chinese must proceed to the consulate and state his grievance. The consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, the consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the consul cannot arrange them amicably, then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the

¹ Art. 15, British 1858; art. 27, American 1858; art. 10, Swedish 1908.

² Art. 27, American 1858; art. 15, Danish 1863; art. 10, Swedish 1908.

case and decide it equitably.”¹ Should Chinese subjects be guilty of any criminal act towards British subjects, they will be arrested and punished by the Chinese authorities according to Chinese law. But “British subjects who may commit any crime in China shall be tried and punished by the consul or other public functionary authorized thereto according to the laws of Great Britain. Justice shall be equitably and impartially administered on both sides.”²

Japanese Spies, 1894. This is the practice to-day, but it is worthy of remark that, as late as 1894, China retained the right of trying all Japanese offenders within its territory. Articles VIII and XIII of the Japanese treaty of 1871 empowered the officials of each state to try the other's subjects for breaches of the peace. On the outbreak of hostilities between these two states in 1894, two Japanese, suspected of espionage, were on the request of the Chinese government arrested at Shanghai by the French authorities within whose settlement they had been found. As the United States had charge of Japanese interests in China, they were handed over to the American consul of that port; against such protection, however, China protested. The Washington government telegraphed to its consul and ordered their surrender to the Chinese. The premises were acquiesced in by Tokyo, on the ground that under the circumstances, Chinese in Japan would be similarly dealt with by the Japanese authorities.³ Since the conclusion however, of the Shimonoseki peace treaty, Japan has likewise been accorded the right of consular jurisdiction over its subjects in China.⁴

The Law to be Administered. Moreover, “so long as the laws of the two countries differ from each other there can be but one principle to guide judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality; the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice. If the officer so attending be dissatisfied with the proceedings, it will be in his power to protest against them in detail. The law administered will be the law of the officer trying the case. This is the meaning of the words *hui t'ung*, indicating combined

¹ Art. 17, British 1858; art. 24, American 1858; art. 10, Swedish 1908. Against a Chinese plaintiff the function of such a court appears to be arbitral, for he is incapable of consenting, without his sovereign's authority, to the exercise of alien jurisdiction over him. In the case of a British defendant it seems to exercise its ordinary jurisdiction, the proceedings being compulsory against him.—Hall, 158-159.

² Art. 16, British 1858; art. 11, American 1858; art. 10, Swedish 1908.

³ For. Rel., 1894, 95-127, 327-376.

⁴ Art. 6, Japanese 1895; arts. 21-22, Japanese 1896.

action in judicial proceedings in Article XVI of the treaty of Tientsin, and this is the course to be respectively followed by the officers of either nationality.”¹ The officer so attending “shall be treated with the courtesy due to his position . . . If he so desires, he shall have the right to present, to examine, and to cross-examine witnesses.”²

Exception. From this general rule an exception occurs in the case of Koreans residing on agricultural lands within the mixed residence district on the Chinese side of the Sino-Korean boundary. These “shall submit to the laws of China, and shall be amenable to the jurisdiction of the Chinese local officials,” and “all cases, whether civil or criminal, relating to such Korean subjects shall be heard and decided by the Chinese authorities in accordance with the laws of China, and in a just and equitable manner.” A Japanese consular officer, or an official duly authorized by him, may freely attend the trial, and, in the hearing of important cases affecting the lives of persons, previous notice will be given to such consular officers. Whenever the latter finds that “a decision has been given in disregard of law, he shall have the right to apply to the Chinese authorities for a new trial to be conducted by officials specially selected, in order to assure justice of the decision.”³

¹ Art. 3, sec. II, British 1876. Cf. Art. 5, treaty (B), Japanese 1915 (*infra*, appendix B).

² Art. 4, American 1880. In actions between Chinese and Russians in Outer Mongolia, the Chinese or Russian assessor “examines the evidence presented, demands security for ‘revindication’ and has recourse to the opinion of experts, if he considers such expert opinion necessary for the elucidation of the rights of the parties, etc.” Only the latter, however, takes part in deciding and drafting the judgment.—Art. 16, Sino-Russo-Mongolian 1915.

³ Art. 4, Japanese 1909. According to the Manchester Guardian (Chinese Supplement, April 18, 1916), this provision is now in the opinion of the Japanese government overruled by the treaty of last year (art. 5, paragraph 2, treaty (B), appendix B, *infra*), whereas the Chinese government holds that as the Korean settlers were granted leases of the land they now occupy on the distinct understanding that they should acknowledge Chinese jurisdiction, the new treaties are not applicable to them. As far as legal interpretation goes, Japan’s construction appears to lack cogency, since the later treaties contain no stipulation expressly abrogating the former engagement. In fact, according to the published accounts of the negotiations leading up to the signature of the new agreements, Japan seems to have confirmed the earlier arrangement in return for the grant of consular jurisdiction in the regions specifically dealt with by the treaties of 1915. Cf. Art. 5, paragraph 1, treaty (B), appendix B, *infra*.

Venue: Consular Courts. Accordingly, foreign subjects are amenable to their own consular courts,¹ and the Chinese to their national tribunals. In Shanghai, an important trading centre, a novel system obtains, however, within the foreign settlements.²

Shanghai Mixed Courts. There in both the International and French settlements a mixed court is established.³ It is a Chinese tribunal and decides all suits and actions between Chinese who are resident within the settlements, as well as between Chinese and foreign residents in cases where Chinese are defendants.⁴ The magistrate is incompetent to try capital and other grave offences, which remain within the jurisdiction of the district magistrate of Shanghai.⁵ But a Chinese criminal escaping to the foreign settlements can be summarily arrested by him, without either a warrant from the district magistrate or aid from the foreign municipal police.⁶ If the cause to be tried concerns a foreigner, a consul or his deputy assessor may sit with him at the trial; otherwise he "shall adjudicate independently. . . . the consuls shall not interfere."⁷ This right of the magistrate has, however, not been consistently respected and, in 1905, a case of conflict of jurisdiction occurred. On remanding some Chinese prisoners arrested on charges of kidnapping, the British assessor directed the witnesses to be taken temporarily to a local philanthropic institution. The Chinese magistrate objected, and a scuffle ensued between the Chinese and foreign municipal police. The assessor's act was reprobated by the diplomatic body, and the Shanghai consuls upon whose resolutions the assessor had acted, were reminded that "by Article I of the Rules for the Mixed Court, it is the magistrate who is authorized to confine Chinese prisoners. These rules were adopted in 1869, by the foreign representatives at Peking and the Chinese government, to whom it belongs to modify them by common consent."⁸

¹ The British and American supreme courts in Shanghai are the only tribunals which hear appeals from their respective consular courts. In the case of other nations, the appellate jurisdiction is reserved to their home or colonial tribunals.

² According to the latest quinquennial census of October, 1915, the numbers of Chinese and foreigners living within the foreign settlements of Shanghai are 766,996 and 20,924 respectively.

³ The regulations in force in the latter settlement are, however, slightly different. See the provisional rules defining the respective jurisdictions of the mixed courts of the International and French settlements, 1902, in China, 1905 (81), on Shanghai consular jurisdiction; Hertslet, II., 802-803; Hinckley, 249.

⁴ Art. 1, 1869 Rules.—Hertslet, II., 662-664; Hinckley, 245-247.

⁵ Art. 4.

⁶ Art. 5.

⁷ Art. 2.

⁸ For. Rel., 1906, pt. I, 384.

Finally, "foreigners who may be charged with any offence, if represented by consuls on the spot, shall be dealt with by them as the treaties provide;" but the subjects of non-treaty powers will be tried and sentenced by the magistrate, "the finding being submitted for the taotai's approval, who will consult with some treaty power consul on the subject."¹

Joint Investigation of Customs Offences:

In regard to cases of confiscation or fines by the Chinese customs for breaches of revenue regulations, the rules of 1868,² providing for joint investigation between the customs authorities and foreign consuls apply. On

Confiscation.

the seizure of a ship or goods, the merchant concerned will be notified and informed of its confiscation unless he appeals through his consul within six days from delivery of notice.³ At the joint investigation he will state his defence to his consul, who will cross-examine the customs officers for him.⁴ If his consul dissents from the decision of the Chinese superintendent to confiscate the vessel or goods, he may appeal; in which case certified copies of the proceedings will be referred by the two officials to their superiors at Peking. If, however, his consul concurs in the decision, he has no right to appeal, "and in no case will the release of ship or goods entitle him to claim indemnity for their seizure, whether they be released after the investigation at the custom house, or after the appeal to the high authorities of both nations at Peking."⁵

Fines.

In case of infractions which, according to treaties, are punishable by fines, the customs commissioner will report the matter to the superintendent and at the same time cause a complaint to be entered in the consular court. If the treaties or regulations in question have fixed a specific fine for the offence, the consul will on conviction enter judgment for that amount, unless the superintendent chooses to mitigate the sentence. Any differences of opinion between the two officials will similarly be referred to Peking. "The merchant shall not be put to an expense by delay, but he shall have no claim for compensation on account of hindrance in his busi-

¹ Art. 7. "The unanimous agreement of the ministers to uphold strictly the rule of the treaties, requiring that in mixed cases a Chinese defendant be tried by a Chinese judge, the foreign consul being restricted to assisting in bringing evidence before the magistrate and having no right to interfere as to his decision in the case, undoubtedly contributed much to the preservation and development of the jurisdiction of China in respect to the claims of foreigners."—Hinckley, 160.

² Hinckley, 237-240; Mayers, 230-232.

³ Art. 2.

⁴ Art. 3.

⁵ Art. 4. Pending the result of the appeal, he will deposit a bond.—Art. 5.

ness, for loss of interest, or for demurrage."¹ If disputes should arise respecting the value of the vessel or goods, the valuation of the merchant will be accepted, and the custom house authorities may take over either at the stated price.²

§ 12. EXTENT OF JURISDICTION.

Jurisdiction All questions in regard to rights, whether of
Personal. property or person, arising between alien subjects shall, as we have seen, be subject to the jurisdiction of their own authorities. Nationality is a wide term and, for our immediate purpose, needs to be defined. According to the practice of the United States, "so far as extraterritorial privileges are involved, American nationality includes all persons, whatever their civil status, who owe allegiance to the United States, either as citizens by birth or by naturalization, or as native inhabitants of the insular possessions, or as seamen on American ships, or as assistants or guards in legations and consulates, or, to a limited extent, as employees of American citizens in Oriental countries."³ On the other hand, the British jurisdiction extends over "British subjects, as herein defined, within the limits of this Order," namely, within the dominions of China, as well as over "the property and all personal or proprietary rights and liabilities within the said limits of British subjects, whether such subjects are within the said limits or not," and "British ships with their boats, and the persons and property on board thereof, or belonging thereto, being within the limits of this Order."⁴ In short, the extent of consular jurisdiction is restricted to the nationals of treaty powers and their property.

Immunity The jurisdiction being personal,⁵ its extent is
from Search. far-reaching. Not only does it comprehend the protection of the persons and property of the nationals of the state exercising such rights and privileges within the treaty ports, but it also includes their protection when they reside or travel in the interior of China, or even when they enter the service of the territorial sovereign. A consequence of such protection is the implied immunity of their houses or vessels within the treaty ports from search or visitation by the territorial authorities. The conventions provide that, "if Chinese offenders take refuge in the houses, or on board the vessels of British subjects at the open ports,

¹ Art. 6.

² Art. 8.

³ Hinckley, 78.

⁴ Art. 5, Order in Council for China, 1904.

⁵ Cf. Koo, 205-211; 21 Harvard Law Review (1908), 437, citing 7 Opinions of Attorneys-General, 495.

they shall not be harboured or concealed, but shall be delivered up, on due requisition by the Chinese authorities, addressed to the British consul.”¹ The “open ports” being specifically mentioned, it is possible that the houses of alien subjects in the interior “may be liable to invasion by the Chinese authorities.”² This privilege, however, does not confer an absolute immunity, it may perhaps constitute a safeguard; for it cannot be intended that asylum should be afforded to persons who have violated the ordinary territorial law.³ The exemption, so far as it goes, appears to be complete even in face of measures adopted by the territorial sovereign for his own defence. During the insurrection of 1913, the Chinese government proposed, *inter alia*, that the houses and vessels of foreigners should be subject to search, under warrants *viséd* by a consul, should one be in the vicinity, so as to prevent any collusion between the aliens and secessionists. The diplomatic body, however, declined the suggestion, on the ground that the representations “jeopardised the rights of foreigners as assured by treaty,” but agreed that “any case in which a foreigner was accused of complicity with the rebels should be dealt with in accordance with treaty stipulations.”⁴

Nationals in the Interior. An alien may travel in the interior under a passport. If, however, “he be without a passport, or if he commit any offence against the law, he shall be handed over to the nearest consul for punishment, but he must not be subjected to any ill-usage in excess of necessary restraint.”⁵ This is the law, but in practice it seems that the usual rule is for the offence to be brought to the attention of the offender’s consul, who will take such action as is required by the circumstances.⁶

¹ Art. 21, British 1858. See *infra*, § 94.

² Hall, 143-144. Although Art. 11, Swedish 1908, refers to “houses occupied by Swedish subjects in China or on board Swedish ships in Chinese waters,” Hall’s interpretation seems correct, since apart from the special case of missionaries, residence in the interior is not conceded to foreigners in general.

³ Hall, 145.

⁴ China, 1914, No. 1, 46. The other proposals were, that any war materials which might be discovered should be submitted to the trial of a prize court, and that foreigners assisting the rebels in the districts under martial law should be captured and punished, the trial and punishment to be in the hands of the Chinese alone should the capture be effected within the fighting zone.

⁵ Art. 9, British 1858; art. 8, French 1858; art. 9, Swedish 1908. “This rendered into plain language, means that the foreigner who commits a rape or murder a thousand miles from the sea-board is to be gently restrained, and remitted to a consul for trial, necessarily at a remote point, where testimony could hardly be obtained or ruled on.”—Minister Reed to Secretary Cass, 1859, in *Sen. Ex. Documents*, No. 30, 36th Cong., 1st sess., 382.

⁶ Jernigan, 227.

**Nationals in
Chinese
Government
Service.**

An alien may enter the service of the territorial sovereign; nevertheless, for some purposes he remains within the jurisdiction of his own authorities. On the one hand, he may not be civilly liable in the consular court for any acts done in his official capacity;¹ if, however, in the performance of his official duties he wounds or kills any one, he is criminally liable but may plead successfully the act of state.² These questions arise frequently in respect of foreign employees of the Chinese customs service.³ In such criminal cases, the accused is required by the customs regulations to resign his position and report to his consul; if he is acquitted, he may be reinstated with full pay from date of resignation.⁴ On the other hand when the employment, though civil, is such that the persons engaged in it are placed under disciplinary rules, it is their employers who have jurisdiction in respect of breaches of those rules; and when the employment is military or naval, the necessary conditions of service are such that persons entering it must be supposed to submit themselves voluntarily to the territorial authorities.⁵ We will cite two instances.

**General Bur-
gevine.**

In 1862 General Burgevine, an American citizen, was appointed by the Chinese government in command of its army to suppress the Taiping rebellion. On his disobedience to orders from Peking, his employers communicated with his minister and intimated that "Burgevine, being now a Chinese subject, and having offended against the law of the country, certainly ought to be arrested and punished in accordance with the law of China." He was expelled from the country on his desertion to the insurgents; in 1865 he returned and, on his recapture, the Chinese government refused to give him up. The American minister, Anson Burlingame, recommended that he should be abandoned to the Chinese authorities, which was approved; but the Washington

¹ Hinckley, 86. But in the earlier cases of *Bowman v. Fitzgray* (China, 1864, No. 3, 31-94) and *Hart v. Gumpach*, L. R. 4 Privy Council App. (1871-1873), 439-457, it was decided that the defendant was civilly liable. The former was a case of seizure of goods by the defendant customs officer, and the latter, one of false representations alleged to have been made to the prejudice of the respondent by the appellant to their common employers.

² Cf. Koo, 193-195; Norton-Kyshe, II., 44-46, 323-329.

³ The total number of foreign officials employed in the Chinese government service was recently estimated at 3968, composed as follows:—Britons, 1105; French, 1003; Germans, 533; Russians, 463; Americans, 174; Japanese, 207; Italians, 75; Austrians, 79; Belgians, 171; other nationalities, 158.—*The East in the West*, October, 1915, 142.

⁴ Cf. For. Rel., 1881, 257; Hinckley, 86-87.

⁵ Hall, 151-152.

government added:—"This is to be understood to rest upon our voluntary consent upon the grounds of national honour, and not upon Chinese right under treaty stipulations."¹

Anglo-Chinese Flotilla. In 1863 Horatio N. Lay, the English inspector-general of the Chinese customs, was despatched to England to purchase some vessels and guns for revenue protection purposes. He exceeded his powers and was subsequently dismissed. As the British minister, Sir Frederick Bruce, reported to his government, "in fact, this flotilla ought to have been designed to carry out the revenue laws, and to assist in suppressing piracy. Less formidable and expensive vessels would have been sufficient for these purposes, and they would have been at the same time, though in a subordinate degree, of much use in assisting military operations. Whereas, a purely war squadron was provided, with officers who looked to *actions d'éclat*, and not to the disagreeable and prosaic task of stopping smugglers and robber-junks It is impossible, in my opinion, to maintain that Mr. Lay's dismissal is a capricious act on the part of the Chinese, or that they had not fair ground to complain of his conduct . . . I do not admit that a man who serves the Chinese as an agent is entitled to exceed his authority, and if he does exceed it, he must do so at his own risk and take the consequences." The above was approved.²

Chinese in Nationals' Employ. An alien may employ Chinese "in any lawful capacity" without any let or hindrance from the local authorities.³ Accordingly, under the Mixed Court Rules of 1869, if a Chinese defendant be in foreign employ, the magistrate will first communicate all particulars to the consul of his employer, the latter being bound not to attempt to screen or conceal them. "A consul or his deputy may attend the hearing, but he shall not interfere if no foreign interest is involved. The servants of non-trading consuls shall not be arrested unless with the sanction of their masters."⁴ The foregoing applies primarily to the foreign settlements at Shanghai; it appears, however, that the same practice is observed in other treaty ports. Thus at Chinkiang, in 1900, two Chinese employees of an American merchant were arrested and punished by the local authorities. As no communication had been made to the American consul requesting their delivery, the action

¹ Dipl. Corr., 1865, pt. II, 462. The rider does not seem to be convincing. For "from the practical point of view, this was not a case of honour but one of necessity; honour is not a sufficient ground upon which to base the abandonment of a right."—Koo, 205.

² China, 1864, No. 2, 25-34.

³ Art. 13, British 1858; art. 17, American 1858.

⁴ Art. 3.

was characterised by the United States minister as "a proceeding flagrantly violating the practice in such cases which has grown up under the treaties in all the treaty ports."¹

§ 13. LIMITATIONS OF JURISDICTION.

The limitations of consular jurisdiction fall under two main heads: (a) Limitations arising from treaty relations, and (b) limitations arising from the principles of international law. In the former, the restrictions are expressed and are defined in the conventions; in the latter, they are implied from the nature of the circumstances and are well understood.

Treaty Stipulations: The limitations born of treaties are found generally in the category of customs regulations, the procedure for the joint investigation of their contraventions having already been dealt with in a former section. For example, foreign merchant-
Customs Regulations. men are not entitled to resort to other than the ports declared open to foreign trade: "they are not unlawfully to enter other ports in China or to carry on clandestine trade along the coast thereof. Any vessel violating this provision shall, with her cargo, be subject to confiscation by the Chinese government."² Should any foreign vessel be concerned in smuggling, "the goods, whatever their value or nature, shall be subject to confiscation by the Chinese authorities," and the ship prohibited from further trading.³ No abuse of flag is to be permitted, any infraction of which shall subject the vessel and cargo to confiscation.⁴ Foreign merchants may import merchandise and pay the duty thereon; but if they attempt to defraud the revenue, "then the goods shall be subject to forfeiture and confiscation to the Chinese government."⁵ In brief, "the Chinese authorities at each port shall adopt the means they may judge most proper to prevent the revenue suffering from fraud or smuggling."⁶

The Agnes. The regulations also require the masters of foreign vessels to obtain the necessary permits for loading or unloading, etc., under penalty of specific fines. These fines, however,

¹ For. Rel., 1900, 394-402.

² Art. 47, British 1858; art. 7, French 1858; art. 6, Swedish 1908. Art. 14 of the American 1858 goes further and provides that, in such cases of confiscation as well as where Americans trade in contraband goods, they "shall be subject to be dealt with by the Chinese government, without being entitled to any countenance or protection from that of the United States. And the United States will take measures to prevent their flag from being abused by the subjects of other nations as a cover for the violation of the laws of the Empire."

³ Art. 48, British 1858; art. 12, Dutch 1863.

⁴ *Infra*, § 49.

⁵ Art. 21, American 1858; art. 24, French 1858.

⁶ Art. 46, British 1858; art. 12, Dutch 1863.

are not enforceable by the customs authorities; proceedings for their execution must be had through the consular courts of the nationalities concerned. In 1862 the *Agnes*, an American bark, put into Ningpo. The duties on the goods having been paid, the master commenced to discharge his cargo after sunset, which was in contravention of the port regulations. The customs officers attempted to stop him, but were roundly abused. The portion which had already been landed was seized, and the discharge of the remainder was banned until he had apologized and paid the fine of 300 taels. The United States minister, Burlingame, protested:—"The undersigned does not deny the right of the Chinese government to enforce its revenue laws by the seizure and confiscation of that property which is found after the owner has violated the law, as when goods have been smuggled; but he does deny the right of the Chinese authorities to punish or fine citizens of the United States under any circumstances. That can only be done, according to Article XI of the treaty, by the Under States consul. . . . If, in landing the cargo, the captain violated the port regulations, then only so much could be seized as was landed contrary to law; that which had not been landed was where it had a right legally to be." The premises were admitted by the Chinese government, when the necessary instructions were issued to the provincial authorities.¹

Territorial Waters.

For the purposes of revenue protection it is universally recognised that a state may adopt whatever measures it deems necessary within its territorial waters; it does not appear, however, that either theory or practice is unanimous as regards the extent of such waters.² With one single exception such limits are not defined in any of the treaties concluded between China and other states.³ The Mexican treaty of 1899 constitutes the exception, in Article XI of which the two contracting parties "agree upon considering a distance of three marine leagues, measured from the line of low tide, as the limit of their territorial waters, for everything relating to the vigilance and enforcement of the custom house regulations and the necessary measures for the prevention of smuggling."⁴ This

¹ Dipl. Corr., 1863, pt II, 845; Koo, 197-198.

² Cf. Oppenheim, I., 255-261.

³ For example, art. 13 of the American 1858 provides that, if United States merchantmen, "while within the waters over which the Chinese government exercises jurisdiction," be plundered by robbers or pirates, the Chinese authorities, on receipt of information thereof, shall apprehend and punish the malefactors according to law, etc. In the similar art. 19 of the British 1858, the words employed are "while within Chinese waters." Cf. "*dans des parages dépendant de la Chine*" of art. 34, French 1858.

⁴ Treaties, II., 1513.

omission is unfortunate, and its awkwardness was demonstrated in **The Tatsu Maru** the case of the *Tatsu Maru*, a Japanese vessel which was seized on February 5, 1908, within Chinese waters, but apparently outside of the three-mile limit, for attempting to smuggle war munitions to Chinese insurgents through one of the southern ports. China proposed to refer the matter to international arbitration, but Japan declined; finally the latter's demands were conceded, whereupon "Japan undertakes to co-operate in the task of preventing the smuggling of arms into China."¹

Case discussed.

The question at issue was whether such seizure was permissible beyond the three-mile limit in order to prevent a violation of the revenue laws of the littoral states;² to this question the settlement, it must be confessed, did not suggest a judicial solution. On the facts of the case the settlement is open to doubt. Hall remarks on this point:—"No civilized country encourages offences against the laws of a foreign state when it sees that the laws are just and necessary; and the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested."³ In corroboration the former Hovering Acts of both Great Britain (1736-1784) and the United States (1797-1807) may be cited. Sir Francis Piggott is even more explicit:—"An analysis of the Territorial Waters Act, 1878, and of the decisions in the *Franconia* case⁴ and in *R. v. Cunningham*⁵ leads, as I believe, to the following conclusions . . . These waters do not exist without definite claim being made to them, but the right to make such claim is recognized for all purposes, especially for the purposes of defensive legislation, other than that of preventing free navigation. When they are so claimed, they are not limited to what in England is known as the 'three-mile limit,' but may extend to such distance as the state claiming them considers necessary for its self-defence, so long as it exercises the right within the limits of reasonable necessity. The three-mile limit is the creation of English law, and is not recognized as the universal limit of international or any other law, though it is adopted in the North Sea Fishery Convention."⁶

As far as precedents go, there appears to be no case parallel to the one under discussion. *Carr v. Francis Times & Co.*⁷ seems analogous.

¹ The London Times, Mar. 14, 1908.

² Cf. 2 Am. J. Int. Law (1908), 391-397.

³ Foreign Jurisdiction, 244.

⁴ *R. v. Keyn*, 2 Ex. D. 63.

⁵ 28 L. J. M. C. 66.

⁶ Exterritoriality, 12-13.

⁷ 1902 A. C., 176-186.

A British vessel having been seized by the Muscat authorities for an attempt at smuggling, the House of Lords decided that, "assuming that the British government might have complained and demanded reparation if the British government had not concurred in what was done, I am unable to see how an English court can hold on general principles of international law only that the Sultan exceeded his own powers in stopping the transit of English munitions of war intended for Persia through his own territorial waters."¹ Here the question at issue was one of jurisdiction; nevertheless, the same reasoning seems to apply. Apart from the legal arguments, the collateral circumstance that the smuggling was a notorious fact may well be considered; and the promise of co-operation on the part of Japan quoted above, seems to lend weight to this view. In addition, it may be noted that British consular jurisdiction extends to offences committed by a British subject on board a British or Chinese vessel "at a distance of not more than 100 miles from the coast of China."² From the premises the case is clearly one for adjudication by an international tribunal.

Under International Law.

The limitations born of international law are those which arise from the nature of the grant of extraterritoriality. The grant being expressed in so many words, its scope is thereby restricted to that extent; and the concession being a delegation of power, such powers alone as are surrendered by the grantor can be exercised by the grantee. No concession of sovereignty is intended; simply a *modus vivendi* between peoples of unlike laws and moral codes.³ All those powers which have not been surrendered are retained by the territorial sovereign, to the exercise of which all persons within his territory, including the grantee's subjects, are bound to submit.⁴

Unsurrendered Powers.

Such delegated jurisdiction remains subject to the incidents of delegation; and "if there be doubt whether certain powers have or have not been conferred by the territorial sovereign, the doubt must be solved in his favour."⁵ For the purpose of discussion the most obvious of such unsundered powers are those pertaining to the adoption of measures providing for the safety of the territory as well as the maintenance of peace and order therein. "In China . . . foreign powers have an extraterritorial jurisdiction, conferred by treaty. This jurisdiction is in no wise arbitrary but limited by laws, and is not preventive, but punitive."⁶

¹ Per Lord Justice Lindley, at 186, *ibid.*

² Art. 80, 1904 Order in Council.

³ Hall, 178.

⁴ Piggott, 8.

⁵ Hall, 135; Koo, 212-228.

⁶ Secretary Bayard to Minister Denby, in For. Rel., 1885, 160.

The right of the territorial government to make rules and regulations affecting all matters within its sovereignty cannot be denied, although the treaty states may protest against them if they contravene the stipulations of any treaties or conventions, or suggest their withdrawal or modification if they appear burdensome.¹ Accordingly, the British minister in China is empowered to enact regulations, having the force of law, *inter alia*, so as to "secure the observance of any treaty for the time being in force relating to any place or of any native law or custom, whether relating to trade, commerce, revenue, or any other matter."²

Police and Sanitation. It is an admitted principle of international law that "motives of self-preservation, sufficiently grave and urgent, warrant a nation in overstepping the usual limits of its rights, and in taking exceptional measures for its security."³ Therefore, matters of police legislation and sanitary regulation reside with the territorial sovereign. This is illustrated in a parallel case in Japan, the language

Japanese Hunting Regulations. there employed being especially applicable here. In 1873, the Japanese government attempted to enforce its hunting regulations upon all persons within its territory. As this happened before the abolition of extraterritorial rights in that country, some doubts were entertained as to their applicability to foreigners. The United States minister upheld the legislation, as "there is nothing in the 'hunting regulations' that I can discover which can be construed to deny to American citizens the right to be tried for any breaches thereof before the American consular courts, and to be punished, upon conviction, according to American law. The penalties prescribed by the regulations can only be held to apply to Japanese subjects, while the prohibitions therein are obligatory upon all. This seems to me to be their intent, and, so I understand, they have been uniformly administered." The premises were approved by the Washington government as follows:—"The right of the authorities of Japan to enact and promulgate laws for the government, security, and good order of its own people cannot, of course, be questioned for a moment, and of the character and efficiency of these laws that government must be the sole judge.... So long as these (extraterritorial) privileges are recognized and respected by the government of Japan, there can be no cause of complaint on the part of this government, in relation to the promulgation of any municipal law or regulation which the legislative authority of that country may deem necessary to its public interest and welfare."⁴

¹ Cf. Minister Denby to Secretary Evarts, in For. Rel., 1880, 239.

² Art. 155, 1904 Order in Council.—Hertslet, II., 884.

³ Hall, 245. Cf. Moore, III., §§ 254-255. In March, 1878, a street in Peking was closed to public thoroughfare.—For. Rel., 1880, 177.

⁴ For. Rel., 1874, 653-658.

Deportation. When an alien commits a flagrant breach of the peace, the territorial sovereign has therefore a right to arrest¹ and deport him. To hold otherwise is to deprive the territorial sovereign of a self-defensive weapon which in some circumstances may be of the highest value, and which he may need against the very state which also possesses it. "Were the foreign state to hold it to the exclusion of the territorial authorities, the latter might have to stand powerless in the face of intrigues directed against their existence under the sanction of the foreign government itself. It is impossible that such a state of things can have been contemplated on both sides; and it cannot therefore be held that Eastern states have in this respect abdicated their sovereign rights."² On the one hand the European state has unlimited power of deportation over its own subjects; on the other, the territorial government retains concurrent power of expulsion for due cause. It is usual in such a case, however, for the offender's minister to be first communicated with before the sentence of expulsion will be enforced, so that an inquiry may be made and rebutting evidence brought forward.

**Subjects of
Non-treaty
States.**

The grant being expressed to the use of the grantee's subjects, it follows that the subjects of non-treaty powers remain within the jurisdiction of the territorial sovereign. From whichever point of view the subject is envisaged,—whether it be the personal character of consular jurisdiction or the territorial sovereign's undelegated powers,—the same result is attained. On the grounds of policy the territorial sovereign may concede extraterritorial privileges to a treaty state, and to that extent exempt its subjects from his jurisdiction; but failing such a grant, all foreigners are amenable to his laws, and the subjects of a state which enjoys no such concession are bound by his laws, so long as they come and remain within the sphere of their operation.

In 1909 China insisted, as heretofore, upon its exercise of jurisdiction over the nationals of non-treaty states. The matter being in respect of the issuance of passports for the purpose of travelling in the interior, the Chinese government intimated in its circular note to the foreign representatives, that "when the application (of such aliens) is made through the consul of another country, the same form of passport will be issued, on verification of which the local officials will give protection and will treat the holders just as they treat their own people." Upon reference of the question by the United States minister to his principals, the latter expressed their concurrence as follows:—"The contention of the Chinese government that the treaty powers have no jurisdiction over citizens of non-treaty nations,

¹ Provided no "ill-usage in excess of necessary restraint" is employed.

² Hall, 179-180.

judged by the well-established rules of international law, would seem to be valid, and the contention put forth by some of the treaty powers that 'extraterritoriality is a natural right' would seem to be groundless and supported by no recognised authority on international law, at least in so far as can be ascertained. The view taken by the Chinese government in this matter has on previous occasions been approved by the department."¹ In the following year, China attempted

Montenegrin to exercise its jurisdiction over a Montenegrin subject in **Subject.** Harbin. Russia, with whom had been entrusted the care of Montenegrin interests, protested and, together with France, regarded it as "an important departure from established usage." She communicated with the United States and proposed the adoption of concerted action among the treaty powers *vis-à-vis* the Chinese circular of the previous year. The suggestion was declined, and the Washington government observed as follows:—"The position uniformly taken by the Federal government has been that, by consenting to lend its good offices in behalf of subjects of other nations (*e. g.* Swiss subjects), it could not assume to assimilate such subjects to citizens of the United States and to invest them with extraterritorial rights which they did not enjoy as subjects of the country of their allegiance. Moreover, the Supreme Court of the United States has held that the question of the jurisdiction of American consular courts in the Orient depends not merely upon international law and the provisions of the treaties, but also upon the statutory law of the United States which plainly provides for the exercise of such jurisdiction in criminal cases over American citizens only. In civil cases also, while the statute is not so clear, the law officers of the Department of State are of the opinion that the jurisdiction is doubtful."² A similar attitude appears to be also maintained by the British government. The circular instructions of May, 1864, of the British minister to his consuls, accordingly contains the following:—"Her Majesty's government has not empowered her agents in China to accept any such jurisdiction over foreigners or Chinese, and it is not expedient or politic to advance any such claim. The subjects of other nations . . . must be dealt with exclusively by their national consuls, if they are subjects of treaty powers; and if they are subjects of non-treaty powers, it is for the Chinese government to devise a means of making them obey the law."³

Chinese Finally, it may be noted that in virtue of the **Domicile.** unsundered powers residing with the territorial sovereign, an alien may acquire a domicile in China for testamentary or other purposes. Thus it was decided by the United States Court for

¹ For. Rel., 1909, 68-70.

² For. Rel., 1910, 839.

³ Dipl. Corr., 1864, pt. III, 380; Koo, 205-211.

China in *In re Allen's Will* (Shanghai, 1907)¹ as well as by the Supreme Judicial Court of Maine in *Mather v. Cunningham* (1909),² which dissented from and, in effect, overruled the earlier English authority, *In re Tootal's Trusts* (1883).³ As has been well said, "where the requisite *factum* and *animus* are shown to exist, there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China. In respect of all matters which private international law refers to the law of domicile he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none the less the law of China because it provides that persons of English or American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China. The legislative power of China extends to all persons and things within the territorial limits of the Empire; the British Parliament in legislating for British nationals in China acts merely under a delegation of authority. Such laws are operative within the territory of China only because China recognizes them as part of the law of the land. The Chinese law subjects certain persons owing allegiance to a foreign government to rules of law which may differ from those that are applied to persons of Chinese nationality, just as the commercial law subjects certain transactions, having their origin in foreign countries, to rules of law which may differ from those that are applied to transactions taking place in the forum. Nor is this principle affected by the circumstance that this law is administered by officials appointed by a foreign government."⁴ In questions of realty the *lex loci rei sitae* is paramount,⁵ and an alien possessed of landed property in China is, *ipso facto*, clothed with the attributes and incidents of a Chinese domicile.⁶

¹ 1 Am. J. Int. Law (1907), 1029-1039.

² 4 Am. J. Int. Law (1910), 446-463.

³ L. R. 23 Chn. D. (1883), 532-542.

⁴ Prof. Charles H. Huberich, in 24 Law Q. Rev. (1908), 448. The above was quoted with approval by the court in *Mather v. Cunningham*.

⁵ See *infra*, § 72.

⁶ In the cases of the *Derflinger*, the *Luetzow* and the *Koerber*, decided before the British Supreme Court for Egypt in March-July, 1915, *Tootal's Trusts* was however followed; but in the later case of the *Eumaeus* (The Times, Nov. 23, 1915), decided before the London Prize Court, Sir Samuel Evans refrained from pronouncing any opinion on the subject. "It is to be regretted that the Alexandria Court followed the older English decisions, in preference to the views of Sir Francis Piggott, Westlake, and Hall, and the American cases of *Allen's Will* and *Mather v. Cunningham*. To quote from the opinion of Mr. Justice Spear in the latter case:—"The whole trend of modern authority is in opposition to the dictum advanced in *Tootal's Trusts*. In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove *animus*. Since the dictum of immiscibility was first declared the world has experienced a revolution touching the national, commercial, and trade relations between the nations of the East and those of the West."—Huberich, in 31 Law Q. Rev. (1915), 450. In view of the application of *lex loci*, here as elsewhere, it seems difficult to reconcile the English decisions with well-established principles of property law.

§ 14. ALIEN POST-OFFICES.

Under the ægis of extraterritoriality there has grown up, in some twenty-five of the open ports, a practice for some of the grantees to establish their own post-offices therein. The anomaly is without legal justification, and in none of the conventions is there a provision therefor. "They are not established with the consent of China, but in spite of her . . . Their establishment materially interferes with and embarrasses the development of the Chinese postal service, and is an interference with Chinese sovereignty. The foreign post-offices are being established principally for political reasons, either in view of their future designs upon the Empire, to strengthen their own footing, or because jealous of that of others. . . . They will not be profitable, and I cannot find any good reason for their establishment by the United States. At Shanghai, where the foreign mail routes centre, they are important, especially in taking charge of and starting the mails homeward, particularly since China is not a member of the International Postal Union."¹ With the entry of China into the Universal Postal Union since March 1, 1914,² there can be now no valid reason for the further existence of alien institutions in this country. By admitting a new member the co-signatories as well as co-accessories have recognised the efficiency of its system, and it is therefore much to be hoped that the irregularity will ere long be remedied.

§ 15. ABOLITION OF JURISDICTION.

Deficiencies of System: As a system extraterritoriality is artificial, and being a *modus vivendi*, it has its drawbacks. Its jurisdiction is personal, and so falls short of success when it is invoked to compose differences between mixed peoples.³ A Chinese may enter a suit

¹ Minister Conger to Secretary Hay, in For. Rel., 1902, 225. This was in reply to the inquiry whether or not the Washington government should follow the suit of France, Germany, Great Britain, Japan, and Russia in their establishment of post-offices; consequently, the only American post-office in China is at Shanghai.

² The operation, however, of the regulations of the Rome convention began on September 1, when China also adhered to the Parcel Post Convention. The question of entry was broached as far back as 1896, when the present postal system was inaugurated. Since then postal agreements have been concluded with various Union administrations—e. g. Germany, Great Britain, Japan, Russia, etc.; and China has also attended the two postal congresses at Washington, 1897, and Rome, 1906. Cf. Report of the Ministry of Communications on the Working of the Chinese Post Office for 1914 (Shanghai, 1915), 2; *ibid.*, 1913, 3.

³ "In its administration of justice the system fails from two causes: first, from the fact that justice is administered by consular not judicial officials; secondly, from the inherent limitations of the extraterritorial court having merely personal jurisdiction." —A. M. Latter, in 19 Law Q. Rev. (1903), 317.

No Counter-claim against a foreigner in the latter's national court, or *vice versa*, but the latter is entitled to no relief if he counter-claims against the plaintiff. The disability may entail hardships and inconveniences; but, as was decided in *The Imperial Japanese Government v. The Peninsular and Oriental Company*,¹ it is a necessary result of the immunity from process in the local courts. "It is the price for which they (Britons) must pay for this immunity . . . A British subject cannot claim the advantage of being amenable exclusively to his own consular court, and at the same time object to the limited jurisdiction which alone it possesses. If the respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese court would be entitled to allow a counterclaim to be made against a British subject, and to require security to be given to satisfy the counterclaim. . . . The effect would be to deny the British subject any redress in that local court except upon the terms of his submitting to its arbitrament of a dispute which under the treaty was reserved exclusively for the determination of the British consular court." ²

Uncertainty of Punishment. In theory a Chinese may always have his redress against an alien in his consular court; in practice, however, there are many difficulties in the way of languages, differences in court procedure, the disparity of punishments in the two systems and the complexities of Western law. Then there is the practice in most consular courts the British and the United States Supreme Courts in Shanghai excepted for the prisoners charged with grave offences to be sent home for final trial and punishment.³ In such cases the sequel is generally unknown to the Chinese directly interested, especially as there are no general extradition treaties between China and other states,⁴ and the belief becomes inevitable that such criminals have escaped unpunished. This practice should be abandoned. It does injustice to both sides: it damages the good name of the foreign country, and robs the Chinese of the satisfaction of knowing that due punishment has been inflicted on the guilty.

Disparity of Penalties. The dissimilarity of penalties between the Eastern and Western codes has its obvious weaknesses, inasmuch

¹ 1895 A. C., 644-660.

² *Ibid.*, 657.

³ For example, a French appeal will be heard in Saigon (French Indo-China), whereas a German appeal must go all the way to Berlin. For practical purposes the United States Court for China is supreme, although in a limited number of cases the appeal will be heard in California.

⁴ See *infra*, §94, for special extradition.

as for the same offence the tribunals administering the two laws may each pronounce unequal sentences. If a Chinese offends against the law, he is severely dealt with in accordance with the law of the land; but a foreign offender is tried by a different code, which is more lenient in its provisions, and receives far less punishment from the consequences of his misdeeds. Thus accidental homicide is excusable in Western law;¹ in Chinese law the accused may not be imputable, but is nevertheless made to compensate the deceased's family.² In 1909, a

De Menil Case. Chinese priest was accidentally shot by De Menil, an American travelling in Yunnan. The latter was tried, but acquitted by the United States Court for China. The matter was carried to Washington, where the Chinese minister was instructed to secure some compensation for the priest's dependents. The claim was not entertained:—"In the first place, this government cannot be held responsible in damages to the relatives of the unfortunate lama for the act of a private citizen travelling in China. In the second place, there is no way under the laws of the United States whereby this government can compel a private citizen to fulfil a promise (of indemnification) to the subjects of a foreign nation." The Department of State, however, recommended that De Menil might be sued civilly for damages based on negligence, "if in the opinion of the family of the deceased, and they are so advised by counsel, death was due to the negligence of the defendant, and if the defendant can be located within the jurisdiction of the United States Court for China, or some other court of competent jurisdiction."³

Again, in the former system, criminal carelessness may not be punishable unless it results in an injury to the person of another, as any injury involving damage to property is civilly actionable; but in the Shanghai foreign settlements, Chinese are convicted and sentenced to imprisonment by the mixed courts for carelessness resulting in damage to the property of aliens. "It is unjust and oppressive that Chinese should be subjected to a higher responsibility than the

¹ *Reg. v. Bruce*, 2 Cox. 262; *Cleary v. Booth*, L. R. (1893) 1 Q. B. 465.

² "Bentham long ago pointed out that the balance in such cases ought to incline in favour of him who suffers the injury rather than in favour of him who commits it, and the adoption of satisfactory remedies such as the penal remedy afforded by the Chinese rule referred to marks a distinct feature of modern law reform, as it is recognised that laws are very imperfect upon this point."—Rice, in 42 Am. L. Rev. (1908), 892.

³ For. Rel., 1909, 55-64. But in the earlier case of Ho Choy-yeen, a victim of some American sailors, the sum of 1,500 dols. gold was paid at the suggestion of the United States minister, who shared the opinion of the court of inquiry that, "if possible, a reasonable indemnity should be paid to the Chinese government for the benefit of the family of the deceased."—For. Rel., 1905, 112-117.

foreigners who live side by side with them on the same spot."¹ This state of things is anything but satisfactory. It often produces friction between the foreign and the local officials, and is a constant source of complaint among the Chinese.²

Promise of Abolition. That consular jurisdiction is admittedly a makeshift arrangement is plain from the language of the conventions themselves. Originally designed to meet the needs of small communities, it is no longer adequate for the requirements of the day. **Precedent Conditions.** Accordingly it is provided that, "China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing."³

The promise to relinquish is explicit; so are the precedent conditions for its performance. The words "and other considerations" may or may not be construed liberally by the treaty states,⁴ the **Implied Conditions.** interpretation of which depending upon the nature of the political interests involved.⁵ The consent is admirable; it might have been perfect if it had been coupled with either a proba-
Probationary Time-Limit. tionary time-limit clause or an honour clause, or both. To stipulate that within a definite period of, say, five or even ten years, if China shall satisfactorily reform her judiciary in harmony with the Western systems, all extraterritorial rights therein will be withdrawn or surrendered, would provide a strong incentive to a people who are doing their utmost to put their house in order. The efficacy of this provision is amply demonstrated in the opium suppression question. According to the Anglo-Chinese understanding of 1907, the import of Indian opium was to cease altogether in ten years, if at the end of the period the Chinese suppression had been completely accomplished; this decennial period to be revisable on the expiration of the first three years. In 1911, in recognition of China's success, the agreement was modified under which the Indian import could cease in less than seven years, on condition that the Chinese

¹ Rice, *op. cit.*, 895.

² Cf. Dr. Wu Ting-fang, address before the New York States Bar Association, in 35 Am. L. Rev. (1901), 362.

³ Art. 12, British 1902. Cf. Art. 15, American 1903; art. 11, Japanese 1903; art. 10, Swedish 1908; art. 3, Japanese 1915—*infra*, appendix B, treaty (B); as well as art. 15, Portuguese unratified 1904.

⁴ Thus Sweden will be prepared so to do "as soon as all other treaty powers have agreed to relinquish their extraterritorial rights."—Art. 10, Swedish 1908.

⁵ See *supra*, 34, for the arbitration of extraterritorial questions.

suppression was continued. In 1913, this import was finally stopped.¹ In addition the stipulation might provide for either an extension of the mixed court system in all treaty ports, or the establishment of mixed tribunals after the Egyptian pattern, the same to undergo a probationary period of so many years.²

Matter of Honour. But a still more powerful inspiration is the honour clause which binds the treaty states to rely implicitly on the loyalty of the Chinese people to perform their part of the contract. For China, "so to speak, would be on its honour, and the whole force of Chinese thought and teaching would then be enlisted in the foreigner's favour through its maxim regarding tenderly treating the stranger from afar. Such a change of principle in the making of treaties would widen and not restrict the field for both merchant and missionary, would do away with irritating privileges and place native and foreigner on the same footing, would remove the sting of humiliation and put the government of China on the same plane as other governments Restore jurisdiction (to the Chinese), and the feeling of the responsibility to protect as well as the appreciation of (foreign) intercourse will at once move up to a higher plane."³

For all the appearance of the conventions one may, perhaps, read such provisions into "and other considerations." The good will of the negotiators stands revealed in their intention to surrender such rights of extraterritoriality, and it is therefore reasonable to infer that thereby they are resolved to afford China every encouragement in the consummation of its reforms.⁴

¹ See *supra*, 19.

² Cf. Eames, 578; Tchou, 138.

³ Hart, 143-146.

⁴ "The new *régime* has introduced changes in the judicial system, and there has been some improvement in the administration of justice The first trial by jury in the annals of China took place on Mar. 23, 1912."—Statesman's Year Book, 1916, 792. There are at present four kinds of courts: (1) Ta Li Yuan, or Supreme Court of Appeal at Peking, which is divided into civil and criminal courts with a bench of five judges. (2) Kao Têng Shên P'an T'ing, or Provincial High Courts in each of the provincial capitals, which decide important civil and military cases and hear appeals from district courts. (3) District Courts, which deal with ordinary cases, civil and criminal, and hear appeals from the courts of first instance. (4) Courts of First Instance, one in each *hsien* or district, and presided over by a single magistrate. See the "Rebirth of a Nation" edition of The China Press (Shanghai), Oct. 26, 1915, for a review of the latest judicial reforms.

CHAPTER IV

CONCESSIONS AND SETTLEMENTS

§ 16. DEFINITION.

"The treaty of perpetual peace and friendship provides for British subjects and their families residing at the cities and towns of Canton, Foochow, Amoy, Ningpo and Shanghai without molestation or restraint.¹ It is accordingly determined, that ground and houses—the rent or price of which is to be fairly and equitably arranged for, according to the rates prevailing amongst the people, without exaction on either side—shall be set apart by the local officers, in communication with the consul."² This article is the origin of present concessions and settlements.

Four Kinds. The places agreed upon for international trade and residence are of four different kinds: (1) A concession, or piece of ground conveyed by deed of grant in perpetuity to a lessee state for the residence of its nationals, the same to be administered by it, "saving the sovereign rights of the Emperor of China."³ (2) A settlement, or site selected for the residence of all foreigners, within which they may organise themselves into a municipality for certain purposes and be governed by their elected representatives.⁴ (3) A

¹ Art. 2, British 1842.

² Art. 7, British supplementary 1843. It is further stipulated that the consul will report annually to the local authorities, for the information of the higher officers, the number of such houses, built or rented; such number, however, is not to be limited, "seeing that it will be greater or less according to the resort of merchants."

³ Eames, 544. Concessions, as above defined and dating from 1859-1861, exist at Canton, Chinkiang, Hankow, Kinkiang, Newchwang, Tientsin, etc. The number of concessions at a port varies with the importance of the locality from one to six. Tientsin, however, has as many as thirteen: British, British extension, British extramural extension, French, French extension, German, German extension, Japanese, Japanese extension, Austro-Hungarian, Italian, Russian, and Belgian. That of the United States, granted in 1861, was immediately abandoned and, in 1902, added to the British concession.—Morse, Trade, 216.

⁴ *E.g.* Shanghai. Originally there were three settlements. In 1862, the French withdrew from the triumvirate arrangement and designated their area as a "concession" under their exclusive control; the British and American were merged under one administration, and are now known as the International Settlement.—Morse, 246-255. The definition of "concession" and "settlement" in the text is, as a rule, not strictly observed, and the two expressions are often used interchangeably.

voluntary settlement, or one in a port spontaneously opened by China itself for the residence of aliens, of which the control of municipal administration and police remain vested in the local authorities.¹

(4) A settlement by sufferance,² or one within which the residents have acquired, without any formal agreement on the part of the territorial sovereign, the tacit right to govern themselves as a municipality.³

§ 17. LEGAL STATUS.

The legal status of these areas may be examined from two stand-points: What are the powers exercisable by foreign municipalities, and what is the nature of such jurisdiction?⁴ Properly speaking, the two may be grouped under one heading, but for the sake of clearness they may perhaps be treated separately.

Extent of Powers of Foreign Municipality. The act of marking out a piece of ground for international residence being designed with the view of furthering the aliens' desire to do trade in China, the authority of their municipality is circumscribed. To the foreigners the site is privileged, within which they may govern themselves as they deem best for the promotion of their common objects. But the grant only exempts aliens dwelling therein from the personal jurisdiction of the territorial sovereign; otherwise the latter's prerogatives are reserved. In the words of the Peking foreign representatives' instructions, August 6, 1863, to the ratepayers of the Shanghai settlements, the powers and limitations of the municipality are defined as follows:—

¹ *E.g.* Yochow, Santuao, Changsha, etc. "Foreigners residing in this open port (Changsha) are to observe the municipal and police regulations on the same footing as Chinese residents, and they are not to be entitled to establish a municipality and police of their own within the limits of this treaty port, except with the consent of the Chinese authorities."—Art. 10, Japanese 1903.

² The terms "voluntary settlement" and "settlement by sufferance" are arbitrary, as they are generally referred to in conjunction with the others as "international settlements."

³ *E.g.* Chefoo, where "they have assessed themselves and have expended their assessments through a headless committee, but have no official status as a self-governing administrative body."—Morse, Trade, 222.

⁴ In the case of a municipality in a concession, the consul of the lessee state convenes and presides over the land-renters' annual meeting for the election of officers; in other respects it resembles its counterpart in a settlement. For the land regulations of the British concessions at Shameen (Canton), 1908; Hankow, 1905-1906; Kiukiang, 1902-1906, etc., see 101 State Papers, 123-131; 24 Commercial Treaties, 311-330; 210-219, 330-331 respectively.

1. That whatever territorial authority is established shall be derived directly from the Chinese government, through the ratepayers' ministers.
2. That such shall not extend beyond simple municipal matters, roads, police, and taxes for municipal objects.
3. That the Chinese not actually in foreign employ, shall be wholly under the control of Chinese officers, as much as in the Chinese city.
4. That each consul shall have the government and control of his own people, as now: the municipal authority simply arresting offenders against the public peace, handing them over, and prosecuting them before their respective authorities, Chinese, and others, as the case may be.
5. That there shall be a Chinese element in the municipal system, to whom reference shall be made, and assent obtained to any measure affecting the Chinese residents.¹

Nature of Jurisdiction. The powers exercisable by the municipality are therefore personal, not territorial. They are limited to "simple municipal matters, roads, police, and taxes for municipal objects." The settlement does not represent a transfer of the land included therein to the government of the state for the accommodation of whose subjects it is set apart by China. The land encompassed in the delegation remains Chinese territory, subject to China's sovereign rights.² The legal position of the foreigners residing within it is the same as that of those residing without it, and foreign holders of real property therein are similarly required to pay a land tax to the Chinese government.³ The provision, however, respecting the Chinese element is not strictly acted upon, although three Chinese delegates are elected annually by the Chinese commercial bodies. These do not represent them on the municipal council, but act as authorized persons who may be consulted by that body in affairs concerning their fellow nationals.⁴ This is a continual grievance with the preponderant Chinese community, when it is remembered that

¹ China, 1864, No. 3, 146.

² Art. 28 of the Shanghai Land Regulations (1866-1869)—the charter of foreign municipalities—provides that amendments to and doubts respecting the interpretation of those regulations "must be consulted upon and settled by the foreign consuls and local Chinese authorities, subject to confirmation by the foreign representatives and supreme Chinese government at Peking."—Hertslet, II., 678.

³ Koo, 236.

⁴ Koo, 235; Morse, 354-355.

the burden of taxation falls heaviest on their shoulders.¹ It is much to be hoped that this injustice will soon be remedied.

**Status of
Chinese
therein.**

The area is reserved for international trade and residence, but it is never intended to exclude Chinese therefrom. In 1908, the foreign consuls of Wuhu proposed to amend the regulations for the international settlement of that port so as to debar the Chinese from residing therein. The amendments were referred by the American consul to his government, but were disapproved. The latter "considers that the exclusion of Chinese from these international settlements at the treaty ports would be unwarranted, and would go far to justify the Chinese in their contention, which we have never accepted, that Americans and other foreigners are not entitled under the treaties to reside within the so-called native cities, but should be confined within the limits of their concessions."² On the other hand, residence therein does not confer upon the Chinese a status different from that which inheres to them from residence outside the area. Despite the fact of such residence they remain subjects of their own government, and the foreign municipal council can invest them with no protection incompatible with the jurisdiction of their own sovereign. Chinese laws apply to them equally as if they reside beyond that area. For example, in 1862, the Shanghai local authorities attempted to enforce an impost upon the Chinese in the British settlement, and requested the assistance of the British consul. The latter admitted the right of the Chinese authorities to impose on their own subjects any tax not interfering with the foreigners' treaty rights; but as regards the Chinese who resided within the settlement, he could not recognise such a right, as it had always been a matter of understanding between the local authorities and his consulate that the former's jurisdiction over their own subjects living within those limits should only be exercised through the British consul. This attitude was repudiated by Sir Frederick Bruce, the British minister, who observed that there was nothing in the treaties which warranted him in interfering in any way in such questions. "The taotai is entitled to levy taxes as he pleases; and as long as he merely seeks to impose taxes on persons resident in the concession, which are paid by those in the city and suburb, I see no reason for objecting to it, at a time when it is our interest as well as that of the Chinese that the government shall not be deprived of its resources." The British minister's view was approved by his government, and Earl Russell added:—"The lands

¹ For the latest quinquennial census of Chinese population in the Shanghai settlements, see *supra*, 39.

² Secretary Root to Minister Rockhill, Nov. 30, 1908, in *For. Rel.*, 1908, 123. ✓

situated within the limits of the British settlement are without doubt Chinese territory, and it cannot reasonably be held that the mere fact of a residence within those limits exempts Chinese subjects from fulfilling their natural obligations.”¹

§ 18. IMPLIED CONDITIONS OF USER.

Quiet Enjoyment.

The grant being expressed for the residence of aliens, their enjoyment of it is subject to certain implied conditions of user. Within this area they may promote the objects they have in common among themselves, so long as these measures do not conflict with or prejudice the interests of the territorial sovereign. They may engage in all articles of trade so long as they are not contraband by the laws of the realm, and they may carry on any form of industry provided that it does no detriment to the paramount well-being of the territorial sovereign. For example, in pursuance of the national anti-opium crusade the opium shops in the native city of Shanghai were completely closed; whereupon the opium smokers flocked to the foreign settlements. The municipal councils were approached respecting the closing of their licensed dens, but they were unwilling to forego their revenue from this source. Up to the present, their response has been lukewarm, although at the beginning they appeared to be not unconscious of their obligations.² This is clearly an infringement of the implied condition of user we are here considering.

Not inimical to Grantor's Interests.

Above all, the interests of the grantor are to be respected and promoted, not thwarted. Accordingly, it is provided by the British regulations of January 2, 1907, that when in the opinion of the consul, “any action by the municipal council is liable to impair the friendly relations subsisting between His Majesty’s government or British subjects on the one hand, and the Chinese government or local authorities or Chinese subjects on the other,” he may either ask for an explanation from the council or veto such legislation, pending the result of an appeal to the minister in Peking.³ The ideal, however, is not always followed, and this seems inevitable as long as the aliens are amenable only to their national officers. Thus, recently, in delivering judgment at the mixed court of the Shanghai International Settlement upon a number of Chinese, charged with attempting unlawfully to sell or possess firearms in the settlement in contravention of the municipal bye-laws as well as Section 204 of the Chinese Criminal Code, the British assessor, Mr. Grant Jones, used the following language:—“Before I proceed to deal

¹ China, 1864, No. 3, 10-11.

² China's Friend, June, 1908, 138-139; *ibid.*, January, 1916, supplement, 2-6.

³ 100 State Papers, 127-128.

with the prisoners themselves, I wish to draw attention to the deplorable state of affairs in the settlement, as revealed during the course of this trial. What should be the habitat of a peaceful community has become an Alsatia of rogues and vagabonds, native and foreign. In its present condition Shanghai is a festering sore in the body politic of China. The evidence adduced before us shows that disreputable foreign firms, disreputable foreign individuals and disreputable Chinese are vying with each other in the traffic, a traffic which can have no other purpose than to effect a breach of the neutrality laws of the country or to promote domestic disturbance and civil strife.”¹

§ 19. QUESTION OF NEUTRALITY.

Grantor's Eminent Domain. “His Majesty the Emperor of China, being of the opinion that, in making concessions to the citizens or subjects of foreign powers of the privilege of residing on certain tracts of land, or resorting to certain waters of that Empire for purposes of trade, he has by no means relinquished his right of eminent domain over the said lands and waters, hereby agrees that no such concession or grant shall be construed to give to any power or party which may be at war with, or hostile to, the United States the right to attack the citizens of the United States or their property within the said land or waters; and the United States, for themselves, hereby agree to abstain from offensively attacking the citizens or subjects of any power or party, or their property, with which they may be at war on any such tract of land or waters of the said Empire. But nothing in this article shall be construed to prevent the United States from resisting an attack by any hostile power or party upon their citizens or their property. It is further agreed that if any right or interest in any tract of land in China has been, or shall hereafter be, granted by the government of China to the United States for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within the said tract of land, except so far as the right may have been expressly relinquished by treaty.”²

Present Experience. This principle, enunciated forty-eight years ago, has so far been scrupulously observed by the treaty powers.³ At the present juncture, however, there seems to be a tendency in some quarters to disregard the above fundamental obligation, it having been suggested that the Allied governments should occupy the German

✓ ¹ L. & C. Telegraph, Jan. 24, 1916.

✓ ² Art. 1, American 1868.

³ See France, 1885, No. 1: Correspondence respecting hostilities between France and China and the rights of neutrals.

and Austrian concessions in China and expel the subjects of those powers therefrom. But in face of the explicit declaration above quoted, the contemplated action appears to involve a violation both of China's sovereignty and neutrality.

Contemplated Writing to an English periodical recently, Sir Francis Piggott, the late Chief Justice of Hongkong, **Action Indefensible.** thus combats the suggestions of "Imperialist," an

anonymous contributor:—" 'Imperialist' says that the foreign settlements in the treaty ports are 'clearly' the property of the holders, that they are outside the sovereignty of China, and that, therefore, those which are held by Germany are legitimate objects of attack by the other powers during the existence of hostilities. Further, he says that the immunity of the settlements from the consequences of a state of war between the nations is quite vague and unreal, and that 'an informal and vague licence of immunity was assumed to have been granted, placing these settlements outside the range of warlike operations;' and he contends that, therefore, the expulsion of the German trader by a local force would involve no violation of either China's sovereignty or her neutrality. But 'Imperialist' ignores two facts; first, that all the powers, except France, have clubbed their rights of settlement in Shanghai into what is known as the 'International Settlement,' and therefore his scheme could not be carried out practically. Secondly, that even a 'concession,' which carries with it larger rights than a 'settlement,' cannot be described as 'a little enclave which is not a Chinese but an European possession.' The privilege of extraterritoriality is purely personal to the subjects of the treaty powers; the right of residence, or settlement, in certain areas, and the exclusive concession of certain areas within which more extensive rights exist, depend on independent grants from China; the creation of municipalities in the treaty ports is the inevitable outcome of custom, tradition, and sufferance, which have also established harmonious business relations between the Chinese and foreigners, and not inharmonious relations between the Chinese and foreign governments. But Chinese sovereignty over the territory remains, and China's rights of sovereignty still exist in so far as they have not been diminished by treaty-grant or sufferance. If there were any doubt as to the accuracy of this statement, it is set at rest by the first of the Additional Articles to the treaty of Tientsin of 1858 between China and the United States, which were agreed to in 1868; it is in the following terms.....This article therefore makes it clear not only that the warfare in the settlements imagined by 'Imperialist' would be contrary to treaty, but also that the grounds on which he justifies it are also expressly destroyed by treaty." ¹

¹ The Fortnightly Review, June, 1915, 1125-1126.

Self-Defence. It is to be noted, however, that this declaration of neutrality does not apply to any action which the territorial sovereign may adopt in a war with a foreign state, or pending its outbreak. In such an eventuality China may close all her ports for military reasons, irrespective of the number of international settlements contained in those which are opened to foreign trade. To construe the stipulation so as to deny her this right of self-defence is to create a situation intolerable at once to her sovereignty and independence. But it is usual for her to remove the obstructions in the way of trade and navigation as soon as the necessity which has called them into existence ceases to operate, and any delay in their removal may afford some ground for complaint.

For example, during the hostilities between China and France, the waters of Canton were put into a state of defence. On the cessation of hostilities the United States protested against the tardy removal of these obstructions. Said the Department of State:—"It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade-runners. This was done by the Dutch when attacked by Spain in the time of Philip II; by England when attacked by the Dutch in the time of Charles II; by the United States when attacked by Great Britain in the Revolutionary war and the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol; and by Germany during the Franco-German war of 1870. But while such is the law, it is equally settled by the law of nations that when war ceases such obstructions, when impeding navigation in channels in which great ships are accustomed to pass, must be removed by the territorial authorities. Such is the rule apart from treaty..... Were there any doubt about this question, which I maintain there is not, it would be settled by the provisions of our treaties with China, which virtually make Canton a free port, to which our merchant ships are entitled to have free access in time of peace."¹ Ultimately the obstacles were removed.

¹ Secretary Bayard to Minister Denby, in *For. Rel.*, 1886, 95.

CHAPTER V

LEASED TERRITORIES

§ 20. DEFINITION.

In 1898 the following ports were leased by China to foreign states:¹ March 6, Kiaochow Bay to Germany for ninety-nine years; March 27, Port Arthur and Talien-wan to Russia for twenty-five years;² May 27, Kwangchow-wan to France for ninety-nine years; July 1, Weihaiwei to Great Britain "for so long a period as Port Arthur shall remain in the occupation of Russia."³ In their essential features these leases resemble one another; and for the duration of the tenancy the territorial sovereign's administrative rights are suspended, unless expressly reserved, and in their place those of the lessee states substituted.

§ 21. LEGAL STATUS.

Under the deed of conveyance the lessor's sovereign rights are expressly reserved, and in some cases the agreement provides for their partial exercise during the period of tenancy. For example, "His Majesty the Emperor of China engages, while reserving to himself all rights of sovereignty in a zone of 50 kilom. (100 Chinese *li*) surrounding the Bay of Kiaochow at high water, to permit the free passage of German troops, within this zone at any time . . . His Majesty the Emperor of China, at the same time reserves to himself the right to station troops within that zone, in agreement with the German government, and to take other military measures."⁴ In the case of Port Arthur, "the lease is under no circumstances to infringe upon the rights of the Emperor of China as sovereign owner of the territory leased."⁵ Moreover, it is stipulated in the Kiaochow agreement that, "should Germany at some future time express the wish to return Kiaochow Bay to China before the expiration of the lease, China engages to refund to Germany the

¹ For the English texts and maps, see Rockhill, 45-61.

² For the present tenancy of this territory, see *supra*, 16, as well as *infra*, appendix B, treaty (B), exchange of notes.

³ Port Arthur having passed from the occupation of Russia, the British lease of Weihaiwei lapsed from the date of Japan's entry. *Cessante razione, cessat lex ipsa*.

⁴ Art. 1.

⁵ Art. 1.

expenditure she has incurred at Kiaochow, and to cede to Germany a more suitable place. Germany engages at no time to sublet the territory leased from China to another power."¹

Lessor's Present Rights. Again, in the waters of the leased ports Chinese vessels enjoy rights not unlike those of the lessee states, although in one or two instances such rights are somewhat modified.

Use of Waters. For example, in the case of Weihaiwei, "Chinese vessels of war, whether neutral or otherwise, shall retain the right to use the waters herein leased to Great Britain."² As regards Port Arthur, "only Russian and Chinese vessels are to be allowed to use it, and it is to be considered a closed port as far as the war and merchant vessels of all other nations are concerned. As to Talienwan, with the exception of a part within the port which, like Port Arthur, is to be reserved for the use of Russian and Chinese ships of war, the remainder is to be a trading port, where the merchant vessels of all countries can freely come and go."³ In the waters of Kwangchowwan, Chinese vessels, as well as those of other friendly powers, "are to be treated in the leased territory as in the ports of China;" but the anchorage "is to be exclusively reserved for French and Chinese ships of war, the latter in the state of neutrality only."⁴ In Kiaochow, Chinese vessels, whether war or merchant, as well as those of other friendly nations, are to be treated favourably; but "since the bay is under the control of Germany, the German government has the right at any time to establish rules for the proper regulation of the vessels of other nations, including China. Beyond this, there will be no further restriction or limitation." On the other hand, when Chinese vessels have paid the dues to meet the cost of harbour improvements, which are payable by those of all nations, they "will be liable to no other dues."⁵

Rights of Chinese Inhabitants. Moreover, the rights of Chinese inhabitants within the leased territories are respected, and in at least one instance, those of Chinese administration are understood to continue. For example, in Weihaiwei, Chinese officials shall continue to exercise jurisdiction within its walled city, except in so far as may be inconsistent with the measures for the defence of the leased territory; and "within that zone Chinese administration will not be interfered with, but no troops other than Chinese or British shall be allowed therein."⁶ In the case of Port Arthur, Chinese inhabitants

¹ Art. 5.

² Art. 5.

³ Art. 6.

⁴ Art. 5.

⁵ Arts. 3-4.

⁶ Arts. 3-4.

may leave or remain at their pleasure, and are not to be driven away. If they commit offences within the leased territory, they "shall be sent to the nearest Chinese authority to be punished according to law," in conformity with Article VIII of the 1860 treaty between the two states. "To the north of the leased territory there shall be left a piece of territory, the extent of which is to be arranged (mutually). This piece is to be entirely left to Chinese officials, but no Chinese troops are to enter it, except after arrangement with the Russian officials."¹ In the case of Kiaochow, Chinese within the leased territory may likewise remain, "provided they show themselves law-abiding," and will receive German protection. If Chinese offenders escape to the leased territory, they "are to be given up to the Chinese officials on written application, but the latter are not to effect arrests in that territory themselves." In addition, "as to Chinese customs stations, of which some are stated to exist beyond the 100 *li* radius, it is provided that arrangements and regulations are to be subsequently drawn up."² Finally, in Kwangchow-wan, as in Kiaochow, Chinese inhabitants are at liberty to continue their residence, as well as their business and occupations, under the protection of France, so long as they respect her laws and regulations.

Rule of International Servitudes. Now, these leases constitute a species of international servitudes, and so will be construed strictly against the beneficiary states. "These and such like privileges or disabilities are the creatures, not of law, but of compact..... They conform to the universal rule applicable to '*jura in re aliena*.' Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it lies the burden of proving its claim beyond doubt or question."³ Such a rule of construction is important and too much stress cannot be laid upon it.

Real Nature of Leases. Furthermore, the lease is unassignable or untransferable. For example, "Germany engages at no time to sublet the territory leased from China to another power." The **Personal to Grantee.** lease is personal to the grantee government, since it concerns a piece of administrative territory, not of mere landed property. For political reasons, the ethics of which need not here be discussed, the territorial sovereign makes a transfer to a foreign state. Vital questions of sovereignty and independence are

¹ Arts. 4-5.

² Art. 5.

³ Hall, International Law, 158-159.

involved in such a transfer, which leaves no room for ordinary business proposals, as in a private lease of land or buildings. The territory so leased is a derogation from the inherent rights of the sovereign owner, a derogation which impairs and diminishes, *pro tanto*, the territorial sovereign's inalienable rights over his own dominions. The essence of a transfer is consent, and this can certainly not be predicated in a transaction which diminishes, though only for a limited number of years, the exercise of jurisdiction by the territorial sovereign over such territory. If the transfer is a fact, it is not entered into willingly by the transferor. His consent is overborne by superior force, and the agreement is concluded under a duress.

Lease Un-transferable.

Accordingly, there can be no question of alienation, assignment or subletting of the territory so leased to a third state. If the lessor is unwilling, though he is by force of circumstances constrained, to make the conveyance, it is inconceivable that he should consent to its transfer to a third party. And if certain political reasons exist to influence the transfer between the lessor and the lessee in the first instance, it cannot be conceived that identical, or even similar, political reasons will exist in future to induce the lessor to admit a third party as his new lessee. Such a lease is unassignable, because the object of the transfer is not a fit subject for bargain in terms of valuable consideration or monetary compensation. If, during the period of the lease, the lessor's right of jurisdiction over the territory is suspended, it surely cannot be imagined that the lessor will consent to the prolongation or extension of such an anomalous state of affairs.

Port Arthur's Case discussed.

Consequently, when Russia transferred its lease of Port Arthur and Talienwan to Japan, in 1905,¹ the transfer was invalid. If a leased territory is in itself untransferrable, it is less so when the assent of the lessor has not been obtained. Under the circumstances, China need not have confirmed or acquiesced in the transaction, since the very *raison d'être* of the lease, not to speak of the absence of the lessor's consent, is lacking. For, in the Port Arthur convention, this purpose is stated to be "in order for the protection of the Russian fleet and to enable it to have a secure base on the north coast of China." Here we have the legend of the "balance of power," which we shall presently discuss. But this is not all. According to the Russian convention, the lease of Port Arthur and Talienwan will expire in 1923. Under **Original Lease Prolonged.** the terms of the Japanese treaties of May 25, 1915,² however, which were concluded after China had accepted the Japanese

¹ *Supra*, 16.

² *Infra*, appendix B, treaty (B), article 1 and note 1.

ultimatum, the original lease of twenty-five years is extended to ninety-nine years; so the lease will not expire till 1997. In addition, the right to operate that part of the Siberian railway concession which leads down to Port Arthur and which, transferred also by Russia to Japan in 1905, is now known as the South Manchurian railway, is likewise extended to ninety-nine years. This railway will, therefore, revert to China in 2002, instead of 1978. The lease is here not only assigned, but also prolonged. The diminution of the lessor's right of jurisdiction is further curtailed for a protracted period, and this in spite of his protest. Such transfer and extension seriously infringe upon China's rights of sovereignty, and are therefore invalid.

Implied Covenants. Since the conveyance is a lease, there are various covenants which a lessee is bound to observe. Some of these covenants are express, and some are implied. The express covenants relate to the reservation of the lessor's rights of sovereignty, the period of tenancy, the non-assignability of the lease, as well as other matters which we have already discussed. The second class of covenants are not expressly mentioned, but are implied and well understood. For example, the lessee must remain on good behaviour and conduct himself properly. He is to enjoy his right of possession quietly, and not commit any abuse or nuisance on the leased territory. Further, he is to make use of his usufructuary right so as not to disturb, prejudice, or infringe upon his neighbour's rights. In other words, he must so use his tenement as not to violate the maxim of *Sic utere tuo, ut alienum non laedas*. Otherwise, he who suffers from the nuisance committed by him or from the wrong done by him, may secure a redress against him, and, in the last resort, get the landlord to deprive him of his possession. Above all, he must restore the original property to the grantor at the end of the lease, and in as good a condition, allowing for reasonable wear and tear, as when the latter first conveyed it to him. Therefore, if when the lease expires, the lessee cannot restore his property to the lessor, the latter has a right to be indemnified by his tenant. If the property restored is one which has greatly deteriorated or depreciated in value, because the lessee has not kept it in good repair, a similar right of indemnification inheres in the lessor.

Breach of Covenants. Now these covenants are important, for, as we shall soon see in the case of the neutrality of Kiaochow in the present war, the breach of any one of them at once gives the landlord a right of action against his tenant. And if the breach is serious, this right of action on the part of the lessor may resolve itself into one of cancelling the lease and depriving the tenant of his right of possession. It is true that the covenants above described are those which attach to an ordinary lease respecting lands or houses. But the conditions

governing the use of an ordinary piece of land as well as that of a piece of administrative territory are similar, except in the important question of transfer or assignment; and so they may here be incorporated for practical purposes.

“Balance of Power.” It is to be noted that such leases are founded upon the legend of the “Balance of Power.” In the Kiaochow convention, the purpose of the lease is expressed to be “to strengthen the friendship of the two countries, and to increase their military power.” This move of Germany is regarded as a menace to Russia, and so Port Arthur is leased “in order for the protection of the Russian fleet and to enable it to have a secure base on the north coast of China.” In the eyes of Great Britain the proximity of Russia to Peking is a danger, and so Weihaiwei is leased “in order to provide Great Britain with a suitable naval harbour in north China, and for the better protection of British commerce in the neighbouring seas.” Weihaiwei, at the head of the Shantung peninsula, commands the Gulf of Peichili, and so is within immediate striking distance of either Port Arthur or Kiaochow. Accordingly, such a lease will last “for so long a period as Port Arthur shall remain in the occupation of Russia.” These transactions are in turn regarded with anxiety by France, and so she secures the lease of Kwangchow-wan in order to protect her interests in Indo-China. In other words, these powers are each suspicious of the others, and each is consequently solicitous of safeguarding his own interests.

Question of Retrocession to-day. But when the above conventions were concluded, it was universally believed that China was in process of disintegration. Therefore, if she was soon to be dismembered, the great powers of Europe were anxious not to be left alone, but must forestall any subsequent bickerings among themselves by first getting the territorial sovereign to agree to sign what was then understood to be his death warrant. That was in 1898, or eighteen years ago. Since those days, however, circumstances have altered, and in the light of to-day, the predicted partition of China seems to be at best an idle dream. Now the lessor shows signs of rejuvenation and renewed vitality, and so the back of the “balance of power” legend is broken. The young Republic is determined to recover its lost prestige, and in such circumstances all legitimate foreign interests will be equally protected. Therefore, there is no necessity for the foreign states to apprehend from the territorial government any weakness or indifference on this score.

Kiaochow after the War. Moreover, Japan has agreed to restore Kiaochow to China at the end of the present war, on the following conditions:—“1. The whole of Kiaochow Bay to be

opened as a commercial port. 2. A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese government. 3. If the foreign powers desire it, an international settlement may be established."¹ Now, since the expulsion of Germany from its leased territory is the joint enterprise of Great Britain and Japan, it may be said that such an agreement cannot be binding on Great Britain. But the retrocession is a laudable object and operates to the good of all parties concerned; so it may be assumed that the undertaking to restore this territory will be duly performed. Whether or not the above conditions governing such retrocession will be fulfilled is, however, another question which the postbellum peace conference will no doubt decide. At any rate, with the "elimination" of Germany from north China, the cornerstone of the "balance of power" has disappeared. Therefore, all other leases should likewise be rescinded, since they were wholly grounded upon the German seizure of Kiaochow. Besides, the powers who were once jealous of one another, and even insisted on holding a leased territory for so long a period as another Chinese territory should remain in the occupation of a third party, are now in active alliance one with another. The pretext for continuing in possession of the leased territory no longer exists to-day, and therefore such territories should be surrendered to the original grantor. *Cessante ratione, cessat lex ipsa.*

"**Rebus Sic Stantibus.**" Finally, there is the well-known doctrine of *Rebus Sic Stantibus*," *sic stantibus* in international law. This will be discussed fully in another chapter.² Here it will be sufficient to remark that if, owing to a "vital change of circumstances," the conditions contemplated have altered since the drawing up of a treaty, then that document is no longer valid. Now, when the leases were granted to the beneficiary states, the lessor was, as has been previously stated, believed to be in the actual process of dismemberment. To-day, a young Republic is conscientiously cleansing the Augean stable of Manchu effeteness and incompetence. The new democracy is already an acknowledged member of the Family of Nations, and so the dreams of "divide and govern" are mere idle phantasies. Eighteen years ago, if one of the lessees was bold enough to seize the territory as his own and compel the lessor to cede it to him in perpetuity, the Manchus might have consented. To-day, a claim of this nature will prove dangerous. A people, who has only five years ago thrown off an alien yoke and recovered its patrimony, cannot be so easily cowed or made to submit. And the aggressor will have to emulate

¹ *Supra*, 17.

² *Infra*, Conclusion.

Germany in Belgium, riding roughshod over all law and sentiments, in order to reach his goal.

Lessor's Above all, such leases fetter the lessor—from
Primary discharging his fundamental duties as a sovereign state.
Duty as a One of these primary duties is to nurture the growth,
Sovereign the development of his country, according to the genius
State. of his people. And this growth, this development, cannot be stopped, since it is natural. It is, however, being fettered by the temporary exercise of an *imperium in imperio* by so many foreign states. Up to the present the burden of this restriction has, perhaps, not been acutely felt. With the rebirth of national consciousness and the rediscovery of its soul, this nation is literally chafing under such unjust restraints. It may soon be that this growth and development will burst its fetters, and then there will ensue mutual recriminations. With the case of Kiaochow before their eyes, the dangers arising from such an anomaly as a piece of Chinese territory leased to a foreign state are manifest. For such a territory not only exposes the territorial sovereign to complaints from both belligerents, but also gives Germany's enemies more than one pretext to violate her neutrality. The restraints seriously interfere with the natural development of this country and even endanger her own self-preservation. Therefore, the time has come for the leases to be cancelled and the territories retroceded to the lessor.

§ 22. QUESTION OF EXTRATERRITORIAL JURISDICTION.

China having engaged not to exercise its rights of sovereignty during the period of the lease, the question arises: How far is extraterritorial jurisdiction still exercisable therein by a third state not a party to the arrangement? At one time there seemed to have been some divergence of opinion on the subject among the treaty powers. The majority declared in favour of its waiver, but Japan insisted on the exercise of those rights as secured to her by her own treaties with China.¹

Attitude of The solicitor of the Washington Department of State,
the United for example, declared as follows:—"As it is expressly
States. stipulated in the leases that China retains sovereignty over the territory leased, it would doubtless be asserted that such territory is Chinese territory, and that the provision of our treaties with China granting consular jurisdiction are still applicable therein. But in view of the express relinquishment of jurisdiction by China, I infer that the reservation of sovereignty is merely intended to cut off possible future claims of the lessees that the sovereignty of the territory is permanently vested in them." But he added significantly

¹ Koo, 255-264.

that, "as these territories have practically passed into the control of peoples whose jurisprudence and methods are akin to our own, there would seem to be no substantial reason for claiming the continuance of such jurisdiction during the foreign occupancy or tenure of the leased territory."¹

Position To-day, it seems that the matter is settled, for Japan herself, after succeeding to Russia's rights over Port Arthur and Talienwan, has intimated in effect that such jurisdiction could no longer be exercised by the states formerly entitled thereto.² Now that this question is, as far as China is concerned, closed for the present, it is not necessary to go into the various aspects of the situation raised herein. The matter primarily concerns the different foreign states, and they, on grounds of political expediency, see "no substantial reason for claiming the continuance of such a jurisdiction during the foreign occupancy or tenure of the leased territory."

§ 23. QUESTION OF NEUTRALITY.

The expulsion of Germany from Kiaochow by the Anglo-Japanese forces in the present war directs attention to the question of the neutrality of such leased territories.

Lessee's Imperfect Ownership. From what we have already discussed in § 21, it is evident that a leased territory can never become an object of hostile attack, if war should at any time break out between the lessee and his enemy. This enemy may be either a fellow-lessee or some other independent state. The lessor's rights of sovereignty are expressly reserved under the deed of conveyance, and the territory so conveyed remains Chinese territory, notwithstanding that the lessee is entitled to occupy it for the duration of the lease. The conveyance is not absolute; it is valid only for a specified number of years, at the expiration of which the property reverts to the grantor. The lessee has no perfect or indefeasible claim to this property, and therefore he can never alienate it. Hence, "Germany engages at no time to sublet the territory leased from China to another power."

Quasi-Neutralization of Territory. Since the lessee is not the absolute or sovereign owner of this territory, his possession partakes of what may be called a status of quasi-neutralization. For example, neutralized Belgium, Luxemburg, or Switzerland cannot embark on offensive hostilities, because in the event of defeat each of these states will be annexed by the victor. This contingency the great powers of Europe have cause to apprehend, and so, to obviate it, they confer on each the status of neutralization. Now, in a somewhat similar way;

¹ For. Rel., 1900, 382-390.

² For. Rel., 1909, 395-396.

a leased territory is also neutralized, although this act of neutralization is not expressed, but implied from the necessities of the case. The lessee's title to the ownship of this territory is imperfect, because he can never reduce such right of possession into one of ownership. The territory is inalienable and untransferrable. It cannot be included in the region of hostilities, for the vanquished lessee is unable to cede it to the conqueror or transfer to him a valid title thereto. *Nemo plus juris in alterum transferre potest, quam ipse habet.*

Covenant for Restitution. Moreover, to make a leased territory an object of attack is to predicate that it is capable of being alienated, or that the lessor will admit the new lessee in the event of defeat of the original lessee. Such a proposition, however, cannot be entertained, since we have already shown that such a conveyance is personal to the original lessee and also untransferrable. To hold otherwise is to suggest that a lessee may disregard his implied covenants and, further, that the lessor will condone or acquiesce in his misdemeanours as well as their consequences. If a lessee may violate his covenants with impunity, then he is a virtual owner of the territory. In which case he need not, for example, restore the property to the grantor at the expiration of his lease, in conformity with the covenant to deliver up his possession in as good a condition as when he received it from the lessor. And this restoration is obviously impossible, if the lessee is worsted and constrained to transfer such territory to his conqueror.

Neutrality of Territory. Under the circumstances, the territory is sacrosanct and inviolable. It remains under the sovereignty of the lessor, and so is neutral. Neutrality is an inherent prerogative of sovereignty. Since a lessee is a mere occupier, he has no option but to restore the property on the termination of his lease. The territory is quasi-neutralized and, therefore, exempted from hostile attack.

Right of Defence. A lessee may not go beyond his right of quiet enjoyment. But to protect his possession he is entitled to defend it against any form of trespass thereon. Regarded from this point of view, such a territory is included in the category of "certain tracts of land" referred to in the Burlingame treaty of 1868,¹ although the commercial purpose of the privilege is here not primary, but secondary. Accordingly, such a grant cannot be construed to give to a state which may be at war with the lessee a right to attack him within such territory or waters. Nevertheless, no such prohibition can be construed to prevent him from resisting all hostile attacks against it, and calculated to deprive him of his rights. For, in order to enable him to restore the property to the lessor, he is bound to keep it in good condition, and this he can only do by

¹ *Supra*, 63.

repelling any attempts to destroy or dispossess him of his possession. Moreover, the territory is quasi-neutralized, and so the lessee must ensure its safety or adopt adequate measures to resist all who infringe upon its neutrality. His defence, of course, may not avail to protect such territory from seizure or damage by a superior hostile force; if so, he has good reason to show that his inability to restore the property to the landlord does not originate from negligence, but flows from *force majeure*. Accordingly, the former will be exonerated, and the latter will then demand redress from the trespasser.

Kiaochow's Case discussed. By way of illustration, we will discuss the case of Kiaochow in the present war. Now, as far as the law is concerned, the Allies' attack on Tsingtau is an undoubted breach of China's neutrality. The status of the territory is not that of a German possession or protectorate in Africa which is legally capturable by the states at war with Germany. That status, as we have already seen, is one of quasi-neutralization. The territory is impliedly preserved from all hostile attacks, for the lessee is bound by his covenant to restore the property to the landlord. Accordingly, it is sacrosanct and inviolable. The action of the Allies, however, is not without rhyme or reason. How far these reasons or pretexts are valid, we will immediately examine into. But we need to keep the law clearly before our eyes, as we wade through a complicated mass of details and arguments. The wading is not easy, and it is essential to be sure of our bearings.

Allies' Pretexts. In effect, the Allies contend that their action is necessitated by Germany's violations of China's neutrality. No action in this direction was contemplated until Germany had disregarded the lessor's neutrality. For example, **German Violations of China's Neutrality.** Tsingtau was being used as a base of warlike operations against the Allies. German cruisers sallied forth from its waters to prey upon the Allies' commerce, and German reservists poured into it by way of Chinese railways. The territorial sovereign himself is weak and cannot compel Germany to respect his neutrality. But the action of the enemy is a serious menace to the interests and well-being of the Allies. Therefore, the latter is compelled in self-defence to overcome Germany in China. The enemy is not easy to reduce, and so the neutrality of the territorial sovereign is unavoidably infringed upon. The act is regrettable, but inevitable.

Allies' Case examined. Here in a nutshell we have the case of the Allies. The Germans are to blame, and China cannot demand any redress from Great Britain or Japan. Now the guilt of the

Germans is an established fact, and we hold no brief for them. But it is also admitted that the neutrality of the territorial sovereign has been violated. The act of violation is, it is said, an act of necessity, and so the Allies are not responsible. It is true that China suffers from the Allies' attack on Tsingtau; but it is also true that the Allies have been injured by Germany's action before its fortress was captured. If the territorial sovereign has a claim on the Allies because the latter violates his neutrality, the latter has also a claim on the former because he cannot prevent the other belligerent from contravening his neutrality laws and so doing damage to the latter. The account, it is claimed, is equal, and so the two can "cry quits."

"Extreme Necessity." We will examine into these contentions. The main weight of the Allies' case lies in the contention that the act is one of self-preservation based on "extreme necessity." It is recognized that self-preservation may entitle one state to do against another state an otherwise illegitimate act, if it can justify the same on the ground of "extreme necessity." But the case of "extreme necessity" must be clearly established; otherwise, the ground is liable to be abused. To illustrate what is meant by "extreme necessity," we will cite the case of the *Caroline*. This incident happened in time of peace, not in time of war. Nevertheless, the facts are almost parallel, and the reasoning seems to apply.

The *Caroline* Case. In 1838, during the Fenian raids on Canada, a body of insurgents having armed and organized in American territory, and having occupied a small island on the American side of the Niagara river, prepared to descend on British territory by means of a small steamer, called the *Caroline*. The officer in command of the British forces determined to frustrate this attempt by cutting the boat from its moorings. A small force, therefore, crossed the river by night and, after a short struggle, captured the *Caroline* and sent it to its doom down the Falls of Niagara. As the cutting took place on American territory, the United States protested, and called on the British government to show a necessity for self-defence which was "instant, overwhelming, leaving no choice of means, and no time for deliberation." The latter explained satisfactorily and, after five years' negotiations, the affair was settled amicably. The latter expressed its regrets that no apology had been offered at the time, and the former accepted these assurances.¹

Present Application. Now, in the present case, it seems that the necessity for self-defence on the part of the Allies can hardly be

¹ Cobbett, I., 162-163.

described as "instant, overwhelming, leaving no choice of means, and no time for deliberation." The danger from the German menace is neither instant nor overwhelming. It is one which leaves the aggrieved party a choice of means and time for deliberation. For example, the Allies might request the lessor to remove the German menace within a certain period of time, failing which the former would take the remedy into their own hands. The intimation would be heeded, for both China and Germany had everything to gain by its being adopted. In fact, there is here no necessity for self-defence sufficient to justify a violation of China's neutrality. In the case of the *Caroline*, the boat would have raided British territory, if it were not destroyed before it could carry out its threat. But in the present case, the danger is not so overwhelming. Such an imminent danger might perhaps arise, if the Germans were actually on the point of attacking Weihaiwei, the respective limits of each being separated by some sixty miles. In which case, the British might in self-defence forestall the German attack. Here, however, such a hypothesis does not enter, and the menace, therefore, could have been averted by direct negotiations between the Allies and the neutral government. Then the violation of China's neutrality would have been obviated.

"Choice of Means." It may be suggested that the issue of Japan's eight-day ultimatum (August 15-23) to Germany, calling on the latter to surrender its leased territory as well as armed vessels within a month, is a hint to China that she should forthwith devise means to discipline her obnoxious tenant. But this is not direct negotiations with the territorial sovereign for the purpose in view. Such negotiations should have been started before the serving of the ultimatum upon Germany; for, once the preliminaries leading up to an armed conflict are set on foot between Japan and Germany, no subsequent negotiations between Japan and China in regard to Kiaochow can be initiated or carried through. As long as these preliminaries are kept out of sight, the interested parties are free to act. On the one hand, the Allies may request the lessor to get the lessee to abate his nuisance, and, on the other, the lessor may impress upon his tenant the necessity of penitence and prudence if the latter is to preserve his rights. The odds admittedly are against the lessee, and, therefore, some such negotiations, if properly initiated, will result satisfactorily to all concerned. If, however, an ultimatum is once issued, the parties are no longer at liberty to negotiate. The *ex post facto* parleying will be coloured by prejudice, and any surrender of the territory may, perhaps, be impeached on the ground of transfer to avoid an anticipated enemy capture. The object of the negotiation is defeated by the alarms of war, and efforts at negotiation will consequently be abortive.

Allies' Case

Under the circumstances, the Allies' case cannot be **not proven**, regarded as proven. The necessity which exists may impel them in self-defence to take the remedy into their own hands. But this is insufficient to warrant them in going to the extreme of violating China's neutrality. They have not exhausted all possible ways and means before they redress their wrong. For, before the attack on Tsingtau, they should have first lodged a formal complaint with the territorial sovereign against his tenant, and during the attack they should have confined their operations within legitimate areas and not extended them to absolutely neutral territory. The contention that the Allies' action is not spontaneous, but provoked by that of Germany, is no defence. If Germany's action is illegal, that of the Allies is also illegal. One is as indefensible as the other, since it is repugnant to all good sense to sanction a wrong committed against another wrong. Two blacks cannot make a white; so no more will two breaches of neutrality make a valid international law. Besides, it is undignified to vindicate one's act by quoting another party's act. For, if A is adjudged a law-breaker, it cannot seriously be advanced that B is prepared likewise to stoop to such notoriety. If hostilities must be waged, the interests and rights of neutrals should at least be respected. Surely, it does not conduce to a veneration for the precepts of law and order, were belligerents to fight their battles on neutral territory and then attempt to justify such violations by the aid of flimsy excuses.

Lungkow. The foregoing represents the largest aspect of violation. We propose now to discuss the narrower aspects of this contravention. When the Allies attacked Tsingtau, they besieged the fortress principally by land. The Japanese landed at Lungkow, situated on the northern end of the Shangtung promontory at the southern end of which is Tsingtau, and over one hundred miles from that port, in order to make the assault from behind the leased territory. The British, however, landed at Laoshan bay, situated within the limits of the territory. We reiterate that the Allies' attack on the German garrison is a *prima facie* violation of China's neutrality. Now to this is added various other infringements, of which the first is the Japanese landing at Lungkow and the march across the promontory, together with all that is denoted and connoted by that expedition. As previously explained, the Allies need never have attacked Tsingtau, if they would formally negotiate with China regarding its interment, or the removal of her German occupant. If, however, it is contended by the Allies that the German danger is "instant, overwhelming, leaving no choice of means, and no time for deliberation," and they are, therefore, justified in quelling it, without waiting for the routine of diplomatic negotiations with the territorial

sovereign, their operations ought entirely to have been restricted to the radius of fifty kilometres, or thirty odd miles, included within the leased territory. There is no valid reason for the Japanese to land at

Absolute Neutral Territory. Lungkow and move troops forward therefrom. If, for the sake of argument it is conceded that the leased territory is one whose neutrality is qualified from the peculiar circumstances of the case, then all the territory beyond the limits of the 50-kilometre radius is indisputably absolutely neutral. The violation of such a territory is flagrant. But this is not all. The districts traversed by the Japanese troops are exposed to requisitions, as well as other rigours and hardships of warfare. And all this for a war between two strangers! Consequently, the Allies' contravention of such a territory is indefensible, and can no more be justified than the German invasion of Belgium as a short cut to France.

Shantung Railway. We come to the Japanese seizure of the Shantung Railway. Under the Kiaochow convention, Germany is given the right to build two railroads from Tsingtau to Tsinanfu. But in the construction of these lines, the agreement provides that "Chinese capital may be invested in these (railway as well as mining) operations, and arrangements for carrying on the work shall hereafter be made by a joint conference of Chinese and German representatives." When the Japanese moved down from Lungkow, they got astride of the main railway and then seized the terminus at Tsinanfu. As this is the provincial capital, some 220 miles from Kiaochow, and situated in the heart of Shantung, China similarly protested. Japan replied and justified the seizure on the grounds of German property and military necessity.

No Right of Confiscation. Now the claim of German property is untenable, since the line in question is not German government property, but a Sino-German concern. Even if the proportion of private German capital is such that the line is more German than Chinese, the claim is still invalid, for private enemy property cannot be confiscated. When found in enemy territory, private enemy property may indeed be temporarily requisitioned, in urgent cases, by an invading military occupant; but such property must be restored after use, and compensation given to its owner. In the present case, the property is situated in neutral territory, and there can be no question of requisition, much less of confiscation of such property. Besides, the belligerent has first violated China's neutrality by occupying neutral territory, and this not only without her sanction, but in spite of her vigorous protests.

"Military Necessity." Probably the real reason for the seizure of the above railway is that of "military necessity." In the words of the Imperial German Chancellor, "necessity knows no law."

According to the Japanese General Staff, if the railway is not seized, the enemy may attack the besieger from behind. This is a serious menace to the safety of the besieging force, and therefore its occupation by the enemy is unthinkable. If the operations against the German fortress are not to be jeopardised, then the security of the besieger must be safeguarded by all possible means. Accordingly, it is necessary to seize the railway and so deprive the besieged from any hope of outside assistance. Now all this is not law, although it may be strategy. For it is just on account of this sort of warfare that the Outlaw of Europe stands condemned in the eyes of the civilized world. It is a crime for Germany to attack France through Belgium, although military necessity may dictate that that short road will accomplish the maximum results in the minimum of time. *Mutatis mutandis*, the seizure of the Kiaochow-Tsinan railway is another flagrant violation of China's neutrality.

German Gunboat Incident. Lastly, we will cite one among the other minor instances of violation, and then proceed to discuss the question of estoppel. During the blockade of Tsingtau

a German torpedo boat ran aground on the Chinese coast without the limits of the leased territory. Thereupon a Japanese vessel went and captured it. This capture having been effected in neutral waters, China also protested. The seizure is a direct contravention of Article II of the thirteenth Hague convention, 1907, on neutral rights and duties in maritime war. That article provides as follows:—"Any act of hostility, including therein capture and the right of search, committed by belligerent warships in the territorial waters of a neutral power constitutes a violation of neutrality and is strictly forbidden." Nor can the seizure be justified on the ground of continuous chase. For it is established that as soon as a vessel chased comes within neutral waters, like the case of defeated troops entering neutral territory, the pursuer must abandon his pursuit. If he continues his pursuit and makes the capture in such waters or territory, the seizure is both invalid and a violation of neutrality.

China's Case examined. So much for an examination of the Allies' case. But in fairness to them it may be admitted that the territorial sovereign himself is not entirely free from blame. The question for consideration is the extent as well as the consequences of such responsibility.

Right of Fortification. It has been postulated, that from the moment China agreed to allow Germany to fortify Kiaochow she lost her right to complain if, in the event of circumstances such as have now arisen, an outside party found it necessary to take violent measures in order to remove those fortifications.¹ Now this

¹ North-China Herald, Sept. 12, 1914.

would be true if China had expressly authorised the lessee to construct the defences for his exclusive benefit. According to the Kiaochow agreement, however, the fortifications are not intended for his sole use, but are designed "at the same time to increase the military readiness of the Chinese Empire."¹ Moreover, the Chinese government reserves to itself, within the zone of 100 li, "the right to station troops, in agreement with the German government, and take other military measures." That is to say, when the tenancy expires and the lessee comes to deliver up his possession to the lessor, the place will be fully equipped with defences for the use and protection of the grantor.² This permission falls short of that granted to the other lessees to erect, and keep in repair, such defence works for their exclusive benefit. In favour of Russia, for example, the treaty provides that "as Port Arthur is solely a naval port. . . . Russia will herself erect what buildings are required for the naval and military forces, for the erection of batteries or barracks for the garrisons, and generally provide all the funds required."³ In respect of Weihaiwei, "Great Britain shall have, in addition, the right to erect fortifications, station troops, or take any other measures necessary for defensive purposes."⁴ And concerning Kwangchowwan, "France may erect fortifications, place garrisons of troops or take any other defensive measures on the leased land."⁵

China not Estopped. Therefore, China never granted to Germany a right similar to that conferred upon the other powers, and so is not estopped from objecting to the violation of her neutrality. If such estoppel could operate at all, it might conceivably be where Germany itself had attempted to expel the other belligerent lessees from their tenements. For example, it could have attacked either Weihaiwei or Port Arthur, each being within easy striking distance of Tsingtau. As a matter of fact it did not, and this surely is significant. But even if it did, the bar against China would still not operate. In fact, as we have already shown, so long as the holding remains the property of the lessor, although the lessee is entitled to its possession for the period of the lease, the latter's rights are imperfect. This right of possession can never be reduced into ownership, and therefore any trespass thereon, especially *vi et armis*, causing damage to the grantor's property, can not deprive the lessor of his reversionary rights. If such damage has been done, the lessor reserves to himself full liberty to demand reparation from the trespasser or wrongdoer.

¹ Art. 1.

² Cf. Rockhill, address to the New York Century Club, Nov. 10, 1914.

³ Arts. 6-7.

⁴ Art. 2.

⁵ Art. 4.

Her Impotence.

China is, however, to blame because she is weak, not because she is negligent. In 1898, it was her misfortune to be found weak and decrepit; otherwise, no leased territories could have been extorted from her. In 1914, it is also her ill luck to be found impotent in the military sense although rejuvenated; otherwise, the question of Kiaochow need never have come up for discussion. Such impotence, indeed, prevents her from compelling either belligerent to respect her neutrality. This, however, does not disentitle her to any relief, for against all infractions of her neutrality she has protested vigorously. She is weak, but she is not negligent in the protection of her interests. If the Allies justify their capture of Tsingtau because Germany first violated China's neutrality by sending troops into Tsingtau on Chinese railways, then the Allies have simultaneously committed an infraction of the same neutrality when, according to the international protocol of 1901 they maintained legation guards as well as garrisons in the metropolitan province, so as to keep open the communication between Peking and the sea.¹ Here we have an important reason which explains the territorial sovereign's impotence—treaty obligations. China desires and is willing to preserve her neutrality, but she cannot carry out her measures because of her treaty obligations. Such a conflict of duties is most embarrassing, and the results are only to be expected. This is why we suggested in a preceding section that the Republic is now entitled under the *Rebus sic stantibus* doctrine to a cancellation of these leases. Under the circumstances, the Allies might have assisted China in maintaining her neutrality, instead of imitating their enemy and emulating his violations.²

Utmost Possible Diligence.

The position of the lessor is, therefore, unenviable, but not hopeless. The Hague conventions enjoin a neutral to maintain strict neutrality, but they do not require him to do the impossible. The status of neutrality may be absolute, but a state's ability to protect the same is not. For example, Articles VIII and XXV of the thirteenth convention lay down that a neutral government is only bound "to exercise such vigilance as the means at its disposal permit," in order to prevent infractions of its neutrality. These infractions, indeed, refer to the fitting out or arming of vessels within neutral jurisdiction by one belligerent against the other. The language used, however, appears to cover various other cases of violations. Even if we confine our definition to the fitting out of armed vessels in neutral waters, it seems that the case of German cruisers making Tsingtau a base of hostile operations against the

¹ *Supra*, 27-28.

² Cf. Sir Francis T. Pigott's thoughtful article, on China and the War. in the *Nineteenth Century*, March, 1915.

Allies' shipping is here covered. Now the means at China's disposal is admittedly insufficient to prevent or restrain the German vessels from carrying on their illegal depredations. Therefore, she cannot be saddled with an absolute responsibility. A neutral is bound to do conscientiously what he can, and not what he cannot. To make the neutral's responsibility absolute is to impose on him a burden so harsh that, compared with neutrality, war may appear less intolerable. And by straining at a gnat, we inevitably drive all neutrals into belligerency. Accordingly, the second state of a neutral is worse than the first, and this is surely not intended by the legislators of international law. Therefore, so long as China exercises her utmost possible diligence, or conscientiously employs the means at her disposal,—for example, she has protested as well as taken measures short of actual open collision with her violators,—it does not seem fair for the Allies to make her a scapegoat of their omissions and commissions.

War Zone. When the Japanese landed at Lungkow, China protested in vain. Thereupon the latter declared a war zone around the leased territory. This extended as far north as Lungkow and as far west as Weihsien, some thirty odd miles from the western limits of Kiaochow,—roughly about twice the area of the original limits. Within this zone the territorial government announced that it would not be responsible for the acts of hostility between the two belligerents. Now it may, perhaps, be suggested that by this act of delimitation China surrenders a portion of her territory to the use of belligerents, and therefore the Allies are committing no violation of her neutrality if they carry on their hostilities within those limits. The fact is, however, that the war zone is not created voluntarily. It is declared not before, but after, the Japanese landing at Lungkow. Since the Japanese can not be prevailed upon or compelled to desist from their purpose, the territory is already violated. Such violation cannot be remedied by the demarcation of a war zone, and belligerent acts committed since that landing are not protected by that demarcation. The landing at Lungkow being illegal, all subsequent acts arising out of it are similarly invalid. For example, a robber enters a house; the householder is powerless to cope with him; and the latter allows the former to take away his property. Surely, the wrongdoer cannot assume that the householder's permission given in these circumstances can give him a valid title to the goods or otherwise exonerate him from his guilt.

Its Significance.

The real object of the delimitation is to forestal the protests of the Germans on this score, as will presently be seen. The creation of the zone predicates no admission on the part of China that the Allies' actions are legitimate, because their

acts are illegal in the first instance and will be continued, whether or not such a zone is created. The zone is really an attempt at a compromise between China's inherent rights as a neutral and the Allies' rights as a belligerent. The compromise is incongruous, but dictated by necessity. The territorial sovereign cannot palliate what the Allies have done or will do; at the same time he must safeguard himself against other complaints. For if German property is destroyed by the Allies in the course of their violations, their owners can claim compensation from him for his negligence to protect them. Therefore, to forestal these claims, China marks out a zone and declares that she will not be responsible for the acts of hostility occurring therein. The expedient is an anomaly, but so is the existence of leased territories, and so is the Allied attack on Tsingtau. The zone may be a crude compromise between Right and Might, but is the best the poor neutral can do under the circumstances.

Germany

Estopped. Germany at once protested against this act of partiality in favour of the Allies, and declared that it would hold the territorial sovereign accountable for any losses which might result from the Allies' actions. Here we have China between the devil and the deep sea: the Allies violate her neutrality because Germany has first violated the same, and the latter threatens to hold her responsible because she allows its enemy to infringe upon her neutrality and so injure its property! But the German protest is untenable, and so the tenor of China's reply is obvious. Kiaochow is leased to Germany for quiet enjoyment, not for aggression. If the lessee makes an improper use of his tenement, he commits a nuisance thereon. If the nuisance is not abated and its continuance will expose the tenement to serious damage from the aggrieved tenants, he commits a breach of the implied covenant for quiet enjoyment. Thereupon the lessor can rescind the lease, get him to quit, or if he refuses, forcibly eject him from the premises. In the present case, the lessor is precluded by force of circumstances from enforcing his own mandate; nevertheless, the dispossessed tenant is estopped from objecting, if his neighbours attempt to remove the nuisance themselves. The title of the defaulting lessee loses its validity so soon as he commits a breach of his covenant, and it is immaterial to him whether he is ejected by the lessor or by his neighbours. The lessor, of course, is vitally concerned how his quondam tenant is ejected—whether by himself or by a third party. But the tenant himself is estopped from any right of protest.

Proper

Solution of In the light of the foregoing we are now in a
Kiaochow position to suggest the proper solution of the Kiaochow
Problem. problem. We have seen wherein one party has
blundered and wherein another party has committed

grave errors. Accordingly, the ideal thing to do is for Germany to retrocede the entire leased territory to China. It is understood that the lessee, before replying to the Japanese ultimatum, did approach the lessor on the subject of Kiaochow's internment. The proposal, however, was accompanied by certain conditions which China had reasons for believing would not commend themselves to the Allies; so the offer was declined.¹ Therefore, this retrocession must be unconditional. In addition, Germany should desist from all activities and operations which will furnish the Allies any cause for alarm. But all this must be done not later than when war is declared against Russia, France and England, if the transaction is not to be invalidated on the ground of transfer to evade enemy capture. Above all, the resurrender must be absolute and perfect so that Germany will have lost all right of control or jurisdiction over the quondam leased territory. Tsingtau will then be a fortified Chinese port, and German menace will have disappeared from China. The Allies will then have no pretext to violate China's neutrality and Germany's commercial interests may still be preserved. As it is, however, the latter loses not only its right to the leased territory, but also various other commercial privileges in Shantung.

Summary. Now to sum up briefly. A leased territory is inalienable, because the lease is personal and confers upon the lessee a right only to occupy it on good behaviour. At the expiration of the tenancy the lessee is bound to restore the property, intact and perfect, to the grantor. The territory is quasi-neutralized and, therefore, is neutral. As regards the special case of Kiaochow in the present war, the Allies are not justified in violating China's neutrality, because the German menace is not "instant, overwhelming, leaving no choice of means, and no time for deliberation." Had Germany been farsighted, she would have resurrendered the leased territory to China, absolutely and unconditionally. But the lessee was blind to the inevitable and so courted disaster. The Allies should have formally called upon the lessor to remove his offending tenant before proceeding to abate the nuisance themselves. The lessor, on the other hand is not entirely free from responsibility. It is his fault to be found physically weak when his ability to defend his own neutrality is tested, but this fact does not absolve those who, being co-signatories of the Hague conventions, should have assisted, instead of taking advantage of his sad plight. China may be blamable for her omissions. But Germany, Japan and England are no less reprehensible for their commissions.

¹ North-China Herald, Sept. 12, 1914.

CHAPTER VI

RIGHTS OF PREFERENCE

§ 24. DEFINITION.

In a certain class of conventions the treaty powers have secured to them what may be termed "rights of preference." These consist of two main species. The first is the so-called "sphere of influence," and signifies that a particular piece of territory shall not be alienated to any third state without the consent of the other contracting party. The second expresses that one contracting state shall have the right to be offered the first option to accept or refuse a certain contemplated transaction. Such transaction may be either the construction of a railway or the flotation of a loan.

These rights of preference do not all originate in the same way. The first species is found in a formal declaration or agreement between the two contracting states and is a regular state document. The second is, however, contained generally in a purely commercial contract between China and a private foreign industrial concern, although sometimes it is also included in a state document. The latter transaction is commercial, pure and simple. In other countries such a transaction is far removed from politics or diplomacy, but in China it assumes a politico-commercial complexion, which will be further discussed when we come to deal with railroads, mines, and loans. Apart from this minor difference, these rights resemble each other in that they are intended to fetter China's independence of action. How far this independence of action is restricted or impaired we will now proceed to discuss.

§ 25. "SPHERES OF INFLUENCE."

As already noted, the first category of preferential rights deals with the non-alienation of a particular piece of territory. The reference here is to the so-called "sphere of influence," but the definition seems to include also the cases of Macao and Kiang Hung. It will be remembered that, in 1887, when China ceded the first named to Portugal, the latter engaged "never to alienate Macao and its dependencies without agreement with China."¹ Similarly, when Great Britain ceded Kiang Hung to China, in 1894, the latter also

¹ *Supra*, 8.

engaged not to alienate the same "without previously coming to an agreement with Her Britannic Majesty."¹ These cases of non-alienation are clear and unambiguous, and we need not enlarge upon them.

As regards the "spheres of influence," we find that these, like leased territories, date from 1897-1898. On March 15, 1897, China declared to France that it would never alienate or cede the island of Hainan to any foreign power, "either as a final or temporary cession or as a naval station or coaling depot;"² and on April 10, 1898, the former assured the latter that it would not so cede any of its provinces bordering on Tongking, "either definitely or temporarily, or on lease, or by any title whatsoever."³ On February 11, 1898, China similarly engaged itself to Great Britain in respect of the provinces adjoining the Yangtse river, whether the alienation was under "lease, mortgage, or any other designation."⁴ On April 26, 1898, a like declaration was made to Japan concerning the province of Fukien, "with all the territory in the interior and along the sea coast within its limits;"⁵ and on May 25, 1915, China assured the same state that "within the province of Shantung or along its coast, no territory or island will be leased or ceded to any foreign power under any pretext," and that it "has given no permission to foreign nations to construct on the coast of Fukien province, dock-yards, coaling stations for military use, naval bases, or to set up other military establishments."⁶

§ 26. LEGAL STATUS.

As far as can be ascertained, the exact nature of these alleged 'spheres' does not appear to be intelligently appreciated.

Hall's Definition. It is claimed that when the territorial sovereign makes a declaration in favour of a foreign state, respecting the non-alienation of a certain piece of territory, that state is forthwith entitled to regard such territory as earmarked for its benefit and ultimate occupation. This claim is a bold one, and we will test it by the aid of Hall's definition of a "sphere of influence." He says that it "indicates the regions which geographically are adjacent to, or politically group themselves naturally with, possessions or protectorates, but which have not actually been so reduced into control that the minimum of the powers which are implied in a protectorate can

¹ *Supra*, 13.

² Rockhill, 173.

³ *Ibid.*, 173-179.

⁴ China, 1898, No. 2.

⁵ Rockhill, 181-182.

⁶ *Infra*, appendix B, treaty (A), note 1, and treaty (B), note 10, respectively.

be exercised with tolerable regularity. It represents an understanding which enables a state to reserve to itself a right of excluding other European powers from territories that are of importance to it, politically as affording means of future expansion to its existing dominions or protectorates, or strategically as preventing civilized neighbours from occupying a dominant military position."¹

Fictitious Now, in the case of the territories we are here
"Spheres." discussing, it will be seen that the above definition is inapplicable. For example, the territories in question cannot be described as adjacent to, or politically grouping themselves with, the various foreign states' possessions or protectorates. The island of Hainan is some eighty miles from Kwangchow-wan; the coast of Shantung is at its nearest point some fifty miles from Port Arthur. But Kwangchow-wan and Port Arthur are leased territories and, as we have already seen, are very different from possessions or protectorates. The nearest possessions which may be described as being adjacent to such territories are Tongking, the nearest port of which is over 140 miles from Hainan; Korea, the nearest port of which is some 170 miles from Chefoo, on the coast of Shantung; and Formosa, which is some eighty miles from the nearest point along the coast of Fukien. The only case of proximity occurs in the provinces of Kuangsi and Yunnan the borders of which march with those of Tongking; but, on the other hand, Hongkong is over 450 miles from the nearest port along the Yangtse river.

Apart from this element of proximity to possessions or protectorates, the actual circumstances which called forth the various declarations in favour of the foreign states deserve to be noted. These declarations were not made spontaneously. Except in the case of Japan, they were given in response to the solicitation of the interested states during the period of the scramble for leased territories and "battle of concessions."² And the engagements in respect of Fukien and Shantung were only granted subsequent to the acceptance of the Japanese ultimatum in May, 1915. Therefore, it is all a matter of duress and overwhelming pressure; there is no question of consent or willingness whatsoever on the part of the declarant state.

Claims Inadmissible. Consequently, the claim that such a declaration in favour of a foreign state at once entitles it to regard the territory in question as earmarked for its benefit and ultimate occupation is inadmissible. If this declaration is made in respect of a territory within which such state has a position recognised as privileged from the amount of capital sunk by its nationals in railroad

¹ Foreign Jurisdiction, 228.

² See *infra*, § 73.

and other industrial enterprises therein, it may, perhaps, be assumed that some such construction may have been intended by the contracting parties. Here again, however, the rule of international law concerning servitudes applies. Namely, that where a grant derogates from the prerogatives of the territorial sovereign, any doubts as to its interpretation must be construed in favour of the territorial sovereign and against the state or states claiming benefits thereunder.

Now in the interpretation of this class of treaties, or documents having the force of treaties, it is predicated that the territorial sovereign retains his inherent rights, unless the same are curtailed by express words to that effect. Therefore, in the present case, he cannot, in the absence of explicit consent, be held to bind himself to anything in the nature of an impairment of his own independence, much less that of admitting a foreign state to the exercise of an *imperium in imperio* within his dominions.

Real Meaning of the Declaration. In favour of the foreign state the declaration may be interpreted as a conditional recognition of its special position by the territorial sovereign. This position is recognised, not so much against the territorial sovereign himself as against all other states; for the privileged state is clearly, by the act of solicitation, apprehensive lest its position of vantage should be wrested from it by, or be given to, a third state. But the construction cannot be pushed further, to imply that thereby the declarant makes a virtual grant to the foreign state which is to take effect at a future date. Consequently, to place upon the declaration any other extraneous construction is to ask the declarant to sacrifice his freedom of action. And this, as we have already seen, cannot be presumed for want of satisfactory evidence. Of course, the different interested states may, and do, arrange among themselves how each will respect the other's special rights and privileges.¹ These arrangements bind only the contracting parties; they are invalid against the state within whose territory such rights are situated. In fine, with or without the declaration, the territorial sovereign is to be understood as reserving to himself all his natural attributes and prerogatives. The assurance merely signifies that, if events should arise in the remote future which may compel him to choose between the claims of different states, those of the state in whose favour the declaration has been made will be respected to the exclusion of all others.

"Questionable Reversionary Right." Moreover, this right of preference which is to begin to operate when the contemplated contingency does occur in the remote future, is a passive power, rather than

¹ For the Anglo-German and Anglo-Russian understandings, see Rockhill, 62, 180, 183-184; China, 1899, No. 1, 27-31; *ibid.*, No. 2; 1900, No. 5.

active. It carries with it no immediate authority, no immediate right of control, although it may contemplate the exercise of that authority should this country break up, or be constrained to alienate the territory in question. In the light of present events, however, it is reasonable to conceive that the contemplated state of affairs will not easily come to pass. When, in 1897-1898, China entered into the agreements under consideration, as well as those respecting leased territories, many wisecracks foretold her imminent disruption, and "the states with world-ambitions were anxious to establish colourable claims, which might be useful when the anticipated struggle for the fragments of her empire began."¹ But since those good old days, she has experienced an unparalleled recuperation. The Republic has already been formally admitted into the Family of Nations by its signatures as well as adhesions to the Hague, Geneva and other universal conventions, and, therefore, will ill brook any attempt or pretence to revive such contemplated exercise of authority. Such an exercise of authority has been termed a "questionable reversionary right."² In the circumstances it appears inevitable that the reversion will never fall in.

"Rebus Sic Stantibus." Finally, there is again the doctrine of *rebus sic stantibus*. As in the case of leased territories, so here in these alleged "spheres," the element of a vital change of circumstances is omnipotent. The right to grow and to develop according to the needs of the country is just as much a primary duty of a sovereign state as the right to exist and be independent. And this is so clearly understood as well as predicated in international law that we need not enlarge upon it. Now, the right of exercise of authority by a foreign state over a certain tract of land, when the contemplated contingency ever should occur, is no active right, as we have seen. But the knowledge that the right is there, although its exercise may be postponed, is not conducive to harmony which is so assential an ingredient in the friendly intercourse between China and the various interested states. Human nature being what it is, it is reasonable to conceive that some over-zealous diplomats of the latter may endeavour to revive or even antedate the claim. Since the declaration is, in the light of present events, a negligible quantity, it is futile to make a capital out of it. Such a claim will never be admitted, unless the interested state is prepared to go to the extreme of emulating Japan and extorting the same by the issue of an ultimatum, with full knowledge that a refusal of the ultimatum will mean plunging the two countries into bloodshed and reaping its aftermath of hatred and enmity.

¹ Lawrence, 182.

² *Ibid.*

Summary. We are, however, no alarmists. We firmly believe that out of this war in Europe, men will emerge much saner beings. Nevertheless, for the welfare of nations who should live one with another in peace and cordiality, not one intriguing against the other, we cannot refrain from this note of warning. Since the declaration is, and bids fair to be, a dead letter, it is a dog-in-the-manger policy to insist that it should continue to adorn an international document. Much the wisest policy is to let it go the way of those other declarations and engagements which are being expurgated by the rule of *Cessante ratione, cessat lex ipsa*. Accordingly, we look forward with confidence to the early disappearance of such anomalies and anachronisms from the pages of international documents, here in China as well as elsewhere.

§ 27. OPTION OF FIRST REFUSAL.

We now come to the second species of preferential rights—the right to accept or refuse a certain transaction. And this, except in a few isolated examples, occurs usually in a purely commercial or industrial contract.

Loan Flotation.

When a foreign loan is contracted, China undertakes that in consideration of the present advance, the creditor will in future be given the first option of refusal to the flotation of a second loan for the same or similar object. This loan may be for purposes of public administration or railway construction. Article XVII of the Reorganisation Loan of 1913 for £25,000,000, for example, reads as follows:—"In the event of the Chinese government desiring to issue further loans secured upon the revenues of the salt administration, or to issue supplementary loans for the purposes of the nature of those specified in Article 2 of this agreement, the Chinese government will give to the banks¹ the option of undertaking such loans.....The Chinese government further undertakes that for a period of six months after the complete issue of this present loan and payment of the last instalment thereof in terms of the prospectus, it will not proceed to the issue of any other government loan, or loan having a government guarantee, concluded later than April 10, 1913, without the previous agreement of the banks."

This right of priority is brought out even clearer in Article XVI of the Currency Reform and Industrial Development Loan of 1911, for £10,000,000, which provides as follows:—"If the imperial Chinese government should desire to obtain from other than Chinese sources, funds in addition to the proceeds derived from this loan, to continue or complete the operations contemplated under this agree-

¹ *I.e.*, of the Five-Power Group: Great Britain, France, Germany, Japan, and Russia.

ment, the imperial Chinese government shall first invite the banks¹ to undertake a loan to provide the funds required; but should the imperial Chinese government fail to agree with the banks as to the terms of such supplementary loan, then other financial groups may be invited to undertake the same; and should the imperial Chinese government decide to invite foreign capitalists to participate with Chinese interests in Manchurian business contemplated under this loan, or to be undertaken in connexion therewith, the banks shall first be invited to participate.”²

Railway Construction. In the case of railway loans, the pledge sometimes goes further. It provides that, the creditor having advanced the money for the construction of a railway in a particular piece of territory, all funds for the construction of subsequent lines within that territory will likewise be provided by the same creditor, unless he should decline the option. For example, Article IV, Section II, of the Kiaochow agreement reads thus:—“The Chinese government binds itself in all cases where foreign assistance, in persons, capital or material, may be needed for any purpose whatever within the province of Shantung, to offer the said work or supplying of materials, in the first instance to German manufacturers and merchants engaged in undertakings of the kind in question. In case German manufacturers and merchants are not inclined to undertake the performance of such works or the furnishing of materials, China shall then be at liberty to act as she pleases.” Similarly, when Japan extorted the treaties of May, 1915, from China, Article II of the agreement respecting the province of Shantung reads as follows:—“The Chinese government agrees that as regards the railway to be built by China herself from Chefoo or Lungkow to connect with the Kiaochow-Tsinanfu railway, if Germany abandons the privilege of financing the Chefoo-Weihsien line, China will approach Japanese capitalists to negotiate for a loan.”³

Conditions “In Restraint of Trade.” Now these are onerous terms and are characteristic of the politico-commercial complexion of such transactions. In harshness as well as usuriousness, they are reminiscent of Shylock’s pound of flesh. But, the transactions being commercial, they are perhaps better designated as conditions “in restraint of trade.” The borrower may want to borrow elsewhere and may even secure better terms, or he may desire to get a third party to finance the construction of his railroad and

¹ *I.e.*, of the Four-Power Group: America, England, France, and Germany.

² For similar engagements, see art. 14 of the 1912 Crisp loan; art. 15 of the Belgian loan of the same year, etc.

³ *Infra*, appendix B, treaty (A). See also *supra*, 12, for the “exclusive privilege” clause,

probably receive more favourable consideration. But if he goes to a certain party who graciously accommodates him once, then under the agreement the former must go again to the latter for subsequent accommodations, unless the lender chooses to decline. This is creating a virtual monopoly in favour of the foreign capitalists. Consequently, they are free to impose their own terms and conditions. And this has the effect of stultifying international trade. Such a monopoly inevitably not only injures the borrower, but it also keeps away other foreign investors. The world is moving towards a community of ideals, a community of intercourse, commercial, economic, and industrial, as well as political. But here is a serious stumbling-block which is being preserved for the exploitation of a fortunate few, when this entire vast market should be thrown open to international trade and investment. It is not the fault of the Chinese shop-keeper that other customers cannot freely come in. The responsibility is on those who, coming early, think theirs is the right to "catch the worm."

Unwholesome Of course, the terms of the monopolists may prove
Moral At- as attractive as those offered by other outside investors,
mosphere. although generally they are not. Nevertheless, the moral atmosphere surrounding such an exclusive transaction is unwholesome, when it is regarded from the point of view of international ethics and fair play. In law, Shylock is quite legitimate in insisting upon his pound of flesh; but, in fact, it is a farce and an outrage upon all good sense. Moreover, the enmeshing of the Jew in his own net is significant, and his prototypes may well profit by his lesson. There is, however, another important consideration. If a spade is a spade all the world over, then business is business. And if business is business in other countries, it ought not to be a cross between commerce and politics in China. The marriage between the two is unnatural and ill-assorted, and it will not be long before either or both will succumb to the strain. If a borrower can secure lenders, there ought not to be anything to fetter his independence of action. And even if he must borrow from one lender, it is illegitimate to engraft politics into the transaction. Business plus politics means undue influence, and this smacks of injustice and oppression.

PART II

TREATIES, CONVENTIONS, ETC., OF AN ECONOMIC CHARACTER

CHAPTER I

RIGHT OF TRADE AND RESIDENCE

§ 28. FREEDOM OF TRADE.

So far our discussion has been confined to treaties and conventions of a political character. We will now examine those of an economic character.

Of the aliens who come to or reside in China, the trading classes constitute the preponderant majority. They may come and go as they please, subject to the regulations about passports and treaty ports, and there are no exclusion laws to deny them admission. Prior to 1842, their right of trade was restricted to very narrow limits. For example, they could not trade directly with any Chinese, but must needs go through a group of merchants known as the Co-hong. Since the treaty of Nanking of that year, all unnecessary restraints were abolished. The stipulation is as follows:—"The government of China having compelled the British merchants trading at Canton to deal exclusively with certain Chinese merchants, called Hong-merchants (or Co-hong), who had been licensed by the Chinese government for that purpose, the Emperor of China agrees to abolish that practice in future at all ports where the British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please."¹

Such freedom of trade is beneficial to all concerned. Accordingly, alien traders will not be "subject to any new limitations, nor impeded in their business by monopolies or other injurious restrictions."²

¹ Art. 5, British 1842.

² Art. 15, American 1844. Monopolies, "corners," unfair trading, etc., are penalised by § 154 of Books 6-7 of the Chinese Code. Cf. Alabaster, 541-557; Dr. Wu Ting-fang, in 35 Am. L. Rev. (1901), 350-351.

§ 29. TREATY PORTS.

When a city or port is thrown open by treaty, agreement, or convention to foreign trade and residence, it is known as a "treaty port" or "open port." This may be a port in the ordinary signification of the word, or it may be an inland city or mart, many miles from the seacoast. The first five were Canton, Amoy, Foochow, Ningpo and Shanghai, opened by the treaty of Nanking.¹ Since then the number of such ports has increased to something like over eighty, until now they seem quite capable of tapping the wealth of the greater part of the country. They are spread out mainly along the seaboard and the Yangtse river as well as its tributaries and subtributaries. In this way they resemble roughly the shape of the letter "T" tilted horizontally.

Treaty Port It is still uncertain what are the precise limits of a
Limits Still treaty port. For the enforcement of the shipping re-
Unsettled. gulations, these limits are defined by the customs authorities, but it is still unsettled how far these limits extend for the purposes of foreign trade and commerce.

Chinese view. On April 10, 1908, the Wai-chiao Pu addressed the diplomatic body as follows:—"In none of the treaties has it been clearly expressed how the limits of a 'treaty port' and the 'interior' must be defined. In the Chefoo convention between China and Great Britain, section III, it is said that no *li-kin* ought to be collected on foreign goods within the concessions of the open ports. Afterwards, it appears from the Additional Articles to this agreement that the question required further consideration. All this shows that the above is a question which has not been properly settled between China and the foreign powers. Up to now the foreign ministers in Peking held the opinion that the words 't'ung shang k'ou ngan' (treaty port) comprised the port, the city of the port, and any road or waterway connecting these two. To this defining of limits we have never agreed. This time the consular body in Shanghai holds that the limits of the port are determined by the imperial maritime customs in accordance with the requirements of the shipping visiting the port, and that within the limits thus determined the levy of *li-kin* is not permissible. This contention is only a proposal from the consular body and cannot be taken as definite."

Foreign view. In reply the foreign diplomats observed:—"In the absence of an explicit definition acceptable to both sides, the intention of the treaties must be examined, and it will doubtless be conceded that the imposition of import duties on foreign

¹ Art. 2, British 1842.

merchandise was intended to admit those goods to particular markets in China, and that it was not intended that these goods should pay other dues until transferred to more distant markets in the interior. Similarly with native products, it was only intended that when they were purchased at a more distant market in the interior for conveyance to a treaty port, and shipment abroad, they should pay a transit due in excess of the import duty. That the foreign powers, in negotiating the treaties, intended that a fairly liberal area should be comprised by the term 'treaty port' or 'port open to foreign trade' is evidenced by the use of the terms 'cities and towns' in the English text of the British treaties, and '*ports et villes*' of the French treaties; also by the rules regarding the issue of passports for travelling in the interior, where no passport is called for within 100 *li* (33 miles) of the treaty port. The tendency, on the other hand, of the Chinese authorities has been to restrict the meaning of the term within the narrowest limits, with the consequence that the tariff on a basis of five per cent. *ad valorem* becomes in effect transformed to a seven and a-half per cent. tariff."¹

Two Views

Discussed. Here we have two contrary views as regards the proper limits of a treaty port. On the face of it the foreign view certainly seems more reasonable. Upon closer examination, however, it does not seem so convincing. For we are once more face to face with the rule of interpretation already cited, respecting international servitudes. Now the object of designating a particular city or port as an open port is to reserve a particular area for the residence of foreigners, within which they may carry on their legitimate trade and be amenable to their own consular officers. Over this area the territorial sovereign has delegated his right of control and jurisdiction. And, therefore, he has also waived his right to tax foreign property therein. But such a waiver operates to diminish the amount of his revenue, and this diminution is a loss to his treasury. If the area of the locality to be exempt from the levy of *li-kin* is increased, then the loss to the territorial sovereign will also increase, since under the treaty tariff he can levy duties on foreign imports to the extent of only five per cent. *ad valorem*. This loss must not be allowed to increase, if the national exchequer is not to suffer further depletion. Therefore, it is within the prerogative of the territorial sovereign to say precisely what part of his territory is to be exempt from the *li-kin* levy. The *li-kin* exemption area is a species of international servitudes, and, therefore, all doubts in this connexion must also be solved in the grantor's favour.

¹ For. Rel., 1908, 143-145.

100 li Rule Inapplicable. Furthermore, it is to be noted that the rule of 100 *li* is not recognised for trading purposes. It is adopted in the matter of issuing passports, but is not applicable here or in any other connexion. For example, in 1907, an attempt was made to justify the rule for the protection of a Chinese offender, Kau Ching-tong, arrested beyond the limits of the Shanghai foreign settlements. The attempt, however, failed.

Kau Ching-tong's Case. Kau, the Chinese representative of a Japanese firm, was apprehended on a charge of violating a Chinese law relating to the transport of tribute rice. In reply to the Japanese consul-general's contention the governor of Chekiang, under whose order the prisoner had been detained, observed as follows:—"Since the facts of Kau Ching-tong's case arose in the inland, and his arrest was made within Chinese jurisdiction, the rules for the mixed court in the foreign settlements have nothing to do with the case. Article VI of the treaty of commerce and navigation of July 21, 1896, provides that 'Japanese may travel to the interior under passports, but that in ports open to foreign trade they may go on excursions without passports, to a distance not over 100 Chinese *li*, and for a period not over five days.' This is a general rule found in the treaties made by China with the foreign nations. It refers only to the case of a foreigner going out on an excursion, and does not mean that the ports open to foreign trade themselves extend in all directions 100 *li* beyond their actual limits. Yet your communication states that 'in accordance with the established rule the limits of a port open to foreign trade extend 100 *li* from the foreign settlements in all directions' ... Moreover, it seems to be quite irrelevant to invoke the special rule regulating the excursions of foreigners in a case of the arrest of a Chinese subject within Chinese jurisdiction."¹

§ 30. PORTS OPENED BY CHINA VOLUNTARILY.

Status of Treaty Ports. In addition to treaty ports, aliens may also reside and trade in those opened by China on her own initiative. In a former section we explained that, in these voluntary ports, the control of municipal administration and police within the international settlements remain vested in the local authorities.² Now, apart from the Chinese control of such municipal administration and police, these ports have the same status as treaty ports. And, like the latter, they are endowed with the same attributes and privileges.

¹ Koo, 249-250; 40 New Collection (Japan), 1 *et seq.*

² *Supra*, 59.

Santuaio**Wharfage
Dues Case.**

For example, in 1899, the customs commissioner at Santuaio (Fukien) announced that, besides the treaty tariff duties, wharfage dues at the rate of two per cent. on customs duties would be collected for municipal purposes. For this would be in harmony with the practice at the treaty ports, where a similar tax was levied by the foreign municipal councils, or collected, as in Tientsin and Shanghai, by the customs and handed over to the councils of the nations concerned for their use. Against this assessment the foreign representatives at Peking, with the exception of the German chargé d'affaires, objected. In the language of the British chargé they asserted that, "to allow the imposition of this tax would amount to the admission of the contention now being raised by the Chinese authorities, that to such ports as Woosung, Chinwangtao, and Santuaio, which had been voluntarily opened by China, the stipulations as to treaty ports are not necessarily applicable; and this admission would but open the way for any further duties and taxes which the Chinese authorities at such ports might wish to impose on foreign commerce."¹ The foreign ministers were disposed to consider any opportunity for levying an additional tax which was moderate and just, but they could not admit that a higher tax might be imposed on commerce and navigation than what was fixed by the treaties; consequently, the surtax of two per cent. on customs duties established at Santuaio would not be fair without the consent of the diplomatic corps. And in the note to the Yamên it was added: "This is a question of principle."²

The matter was finally referred by the British representative to his government. His attitude was approved, and Lord Salisbury concluded his instructions as follows:—"No distinction can be admitted by Her Majesty's government between ports opened by treaty or arrangement with a foreign power and those declared open by the initiative of the Chinese government."³

§ 31. PORTS OF CALL.

Beside treaty ports and voluntary ports, foreign vessels are also permitted to carry on a limited traffic at certain localities along the great rivers. These are known as "ports of call."

In the British agreement of Chefoo, 1876, the first six were designated along the Yangtse river as follows:—"These places being all places of trade in the interior, at which, as they are not open ports, foreign merchants are not legally authorised to land or ship goods, steamers shall be allowed to touch for the purpose of landing or shipping passengers or goods; but in all

¹ China, 1900, No. 1, 251.

² *Ibid.*, 211, 406.

³ *Ibid.*, 276.

instances by means of native boats only, and subject to the regulations in force affecting native trade." It is further stipulated, that "produce accompanied by a half-duty certificate may be shipped at such points by the steamers, but may not be landed by them for sale;" and "foreign merchants will not be authorized to reside or open houses of business or warehouses at the places enumerated as ports of call."¹

§ 32. RIGHT TO ACQUIRE LANDS OR HOUSES.

To facilitate as well as promote their right of residence and trade, aliens must have houses or lands for the erection of the same. Thus is granted the right to acquire lands or houses. We quote from the American treaty of 1858:—"Citizens of the United States, residing or sojourning at any of the ports open to foreign commerce, shall be permitted to rent houses and places of residence, or hire sites on which they can themselves build houses or hospitals, churches and cemeteries. The parties interested can fix the rent by mutual and equitable agreement; the proprietors shall not demand an exorbitant price, nor shall the local authorities interfere, unless there be some objections offered on the part of the inhabitants respecting the place. The legal fees to the officers for affixing their seal shall be paid. The citizens of the United States shall not unreasonably insist on particular spots, but each party shall conduct with justice and moderation."²

The right of acquisition of lands is, however, limited, as will be explained later.³ Here we may observe that no right of purchase is conceded, but they may "rent or lease in perpetuity land and build thereon."⁴

§ 33. EXTENT OF TRADING PRIVILEGE.

**Trade and Manu-
factures.** Subject to the prohibition respecting traffic in contraband goods, foreign merchants may carry on all forms of legitimate commerce. They may employ Chinese in any lawful capacities, or hire native boats or vessels, or engage pilots, or establish bonded warehouses for storage, re-packing, or shipment of lawful goods, subject to the necessary customs regulations. In brief, "it shall be lawful for them to hire at pleasure servants, compradores, linguists, writers, labourers, seamen, and persons for whatever necessary service, with passage or cargo-boats, for a reasonable compensation to be agreed upon by the parties or determined by the consul."⁵ Moreover, they may engage in manufacturing industries

¹ Art. 1, sec. III.

² Art. 12, American 1858.

³ *Infra*, Part II, Chapter VI.

⁴ Art. 3, American 1903.

⁵ Art. 17, American 1858.

or import into China all kinds of machinery, and pay the tariff duties thereon.¹

China at War. So much for the extent of the trading privilege from the point of view of the nature of the transactions. As regards the extent of the use of open ports, it is agreed that in the event of hostilities arising between China and another state, the vessels of a neutral treaty state are still entitled to the use of such ports. For example, the American treaty of 1858 provides that if, in future, China should be at war with any foreign **Rights of** nation and should for that cause exclude the ships of such **Neutrals.** nation from entering her ports, "still the vessels of the United States shall not the less continue to pursue their commerce in freedom and security, and to transport goods to and from the ports of the belligerent powers, full respect being paid to the neutrality of the flag of the United States." But "the said flag shall not protect vessels engaged in the transportation of officers or soldiers in the enemy's service, nor shall said flag be fraudulently used to enable the enemy's ships with their cargoes to enter the ports of China." The state of belligerency must be recognised, and therefore "all such vessels so offending shall be subject to forfeiture and confiscation to the Chinese government."² If the enemy declares a blockade and the same is effectively enforced, the vessels of all foreign nations will, of course, be refused ingress or egress by that state.³

State of In- The foregoing applies to a state of war between **urrection.** China and a foreign nation. But the language employed seems to apply also to a state of insurrection. Suppose during the Revolution of 1911-1912, when the southern provinces had declared their independence, the Manchu government at Peking attempted to close the southern ports to all foreign shipping by merely declaring them no longer open to trade. This form of closure is forbidden in international law, and the interdiction is expressed as follows:—"A **Rule of Inter-** state is free to exclude both foreign and domestic vessels **nation Law.** from any harbour over which it actually exercises the powers of sovereignty. But when its authority is at an end owing to insurrection or belligerent occupation by a hostile force, it must fall back on warlike measures; and the only warlike measure which will lawfully close a port against neutral commerce is an effective blockade."⁴ Therefore, the attempted closure would be invalid, unless it was backed up by an effective blockade of the coast or ports in question.

¹ Art. 6, Japanese 1895.

² Art. 26, American 1858.

³ Art. 31, French 1858.

⁴ Lawrence, 686.

§ 34. UNAUTHORISED PLACES FOR TRADE.

Non-treaty Ports.

As we have already seen, the places reserved for international trade and residence are individually designated. Foreign merchants are, therefore, excluded from trading in non-open ports or ports not so designated. Accordingly, their vessels are not permitted to carry on a clandestine commerce along the sea-coast or other unauthorised ports, and any infringement of this rule will subject the offending vessels or goods to confiscation by the Chinese authorities. In favour of shipwrecked merchantmen, however, an exception is made under which they may put into all ports, when compelled to seek shelter therein from stress of weather or circumstances.¹ In this case their cargoes may be unloaded, so as to facilitate the doing of repairs to the vessels, and no duties will be payable on cargoes so discharged. Should it be attempted, however, to dispose of them for profit, they will be liable for the full tariff duty.

Non-demar- cated Areas.

Moreover, within the open ports, alien merchants may only reside and do trade in areas definitely bounded or delimited. For, if all foreigners should be scattered about the different parts of a treaty port, it would on the one hand add to the arduousness of their consuls' duties to control them effectively, and, on the other, increase the burden of the territorial authorities to accord them adequate protection—a protection already much attenuated by the consequences of extraterritoriality. Therefore, for the convenience of all concerned, special areas are designated or demarcated. The different types of such areas we have already discussed in a previous chapter on concessions and settlements.²

Japanese Treaty 1896.

This conclusion is the result of treaty stipulations as well as precedents. For example, Article IV of the Japanese treaty of 1896, provides as follows:—"Japanese subjects may, with their families, employees, and servants, frequent, reside, and carry on trade, industries, and manufactures, or pursue any other lawful vocations, in all the ports, cities and towns of China which are now or may hereafter be opened to foreign residence and trade;" and "*within the localities at those places which have already been or may hereafter be set apart for the use and occupation of foreigners, they are allowed to rent or purchase houses, rent or lease land,*" etc.

Test Case.

The words here underlined are restrictive. In spite of their explicitness, an American nevertheless attempted soon after to establish an insurance company within the native city

¹ See *infra*, § 97.

² *Supra*, Part I, Chapter IV.

of Hangehow which had been opened by the above Japanese treaty. He was resisted by the local authorities. The question was referred to Washington, and the solicitor of the Department of State ruled that the underlined clause effectually barred the alien's right of admission into any areas not so demarcated. This opinion was subsequently reported by the American minister to have been similarly acquiesced in by Great Britain and other powers.¹ Accordingly, it is

American Treaty, 1903. reproduced in Article III of the American treaty of 1903, as follows :—“Citizens of the United States may frequent, reside and carry on trade, industries and manufactures, or pursue any lawful avocation, in all the ports or localities of China which are now open or may hereafter be opened to foreign residence and trade; and, *within the suitable localities at those places which have been, or may be, set apart for the use and occupation of foreigners,* they may rent or purchase houses, places of business and other buildings, and rent or lease in perpetuity land and build thereon,” etc.

Canon of Interpretation. It may be contended that if China opens a port or place to foreign trade and residence, it is meaningless to restrict such trade and residence to definitely demarcated areas; the provision should rather include the whole port and the Chinese city, as well as the foreign business and residential quarters. But the rule of international law regarding international servitudes must, here as elsewhere, always be borne in mind in the construction of treaties which derogate from the inherent rights, privileges, attributes and prerogatives of the territorial sovereign. The treaty **Rule of International Servitudes.** right of aliens to be exempt from the jurisdiction of the local courts and be amenable only to their own national officers, is admittedly a derogation from the prerogatives of the territorial sovereign, and as such is a clear case of international servitudes. Therefore, any doubts as to the extent of the powers delegated by the territorial sovereign to be administered by the beneficiary states must be “solved in his favour.” If China opens certain ports and places to foreign trade and residence, and within those places demarcate or set apart special areas therefor, it is because the aliens enjoy the treaty rights of extraterritoriality. Of course, if these rights are withdrawn or relinquished, every nook and corner of the whole country will be open to foreign trade and residence. Until that consummation has come to pass, however, it appears inevitable that the aliens, clothed with the rights of extraterritoriality, will be restricted to the demarcated areas within the open ports. As has been well said by the Judicial Committee of the Privy Council,

¹ For. Rel., 1897, 72-80.

in *The Imperial Japanese Government v. The Peninsular and Oriental Company*,¹ though the point in dispute there dealt with another allied phase of this system of consular jurisdiction, "the disability may entail hardships and inconveniences, but it is a necessary result of the immunity from process in the local courts. It is the price for which they (British subjects) must pay."

Wuhu Consular Action, 1908. It will be remembered that when we dealt with the question of the status of Chinese residing within the foreign settlements, we cited the action of the Wuhu consular body, in 1908.² The consuls proposed to amend the regulations for the international settlement of that port so as to debar the Chinese from residing therein. The American consul asked his government for instructions in the matter, and the Department of State replied that "the exclusion of Chinese from these international settlements at the treaty ports would be unwarranted, and would go far to justify the Chinese in their contention, which we have never accepted, that Americans and other foreigners are not entitled under the treaties to reside within the so-called native cities, but should be confined within the limits of their concessions."³

An Obiter Dictum. Now, the foregoing may seem to lend some support to the contention that foreign residence is not necessarily confined to demarcated areas. But the pronouncement is a mere *obiter dictum*, since the declaration was not made in decision of an actual case bearing on this precise point submitted to the Department for review. The *dictum* is no doubt entitled to our respect, but as a precedent it will hardly be given much weight or consideration in a court of law. And if it were invoked to fortify the contention under discussion, it would undoubtedly be overshadowed by the express language of the treaties already quoted as well as the aforementioned rule governing international servitudes. Therefore, the unwillingness of the Department to acquiesce in the Chinese attitude is to be construed as a desire to keep open a claim which may be pressed home at the first favourable opportunity. This desire is founded on policy, not law.⁴

§ 35. RESIDENCE IN THE INTERIOR.

In view of the extent of the rights of extraterritoriality, foreigners in general are not permitted to reside in the interior. The only exception occurs in favour of foreign missionaries, in consideration and encouragement of their laudable activities.

¹ *Supra*, 54.

² *Supra*, 61.

³ For. Rel., 1908, 123.

⁴ For the anomalous position of foreign trade and residence in Peking, a non-open port, see *infra*, § 66.

At one time some doubts were entertained how far, if at all, foreign missionaries could reside in the interior; for, in the Chinese text of the French convention of 1860, there was interpolated a clause, not contained in the French text, that "it is, addition, permitted to French missionaries to rent and purchase land in all the provinces, and to erect buildings thereon at pleasure." In the agreement the French language was declared the authoritative text; accordingly, the governments of other missionaries hesitated to claim thereunder any benefits for their nationals.¹

At present, however, their right is governed by Article XIV of the American treaty of 1903, which provides that they may "rent and lease in perpetuity, as the property of such societies, buildings or lands in all parts of the empire for missionary purposes," etc.

§ 36. RIGHT OF CHINESE EMIGRATION.

Until 1860, all Chinese were under a statutory prohibition not to "proceed clandestinely to sea to trade, or remove to foreign islands for the purpose of inhabiting and cultivating the same," under penalty of being dealt with "according to the law against communicating with rebels and enemies."² Article V of the British convention of that year, however, provides as follows:—"His Imperial Majesty the Emperor of China will by decree command the high authorities of every province to proclaim throughout their jurisdiction that Chinese, in choosing to take service in British colonies or other parts beyond the sea, are at perfect liberty to enter into engagements with British subjects for that purpose, and to ship themselves and their families on board any British vessels at the open ports of China; also that the high authorities aforesaid shall, in concert with Her Britannic Majesty's representative in China, frame such regulations for the protection of Chinese emigrating as above, as the circumstances of the different open ports may demand."³

§ 37. CHINESE EXCLUSION FROM FOREIGN STATES.

In the treaties it is generally stipulated that subjects of the contracting parties shall enjoy each within the dominions of the other full protection in person and property.⁴ Notwithstanding this

¹ Cf. Curzon, 292-295; Holcombe, 159-163.

² § 225, Penal Code; Davis, II., 345; Parker, 84; Martin, 160-161.

³ These regulations not having been framed, the agreement of 1904 (*supra*, 18) was concluded. The annual efflux and influx of Chinese emigrants constitute a main source of profit for some of the southern ports. See British Consular Reports, 1912-1914, for Amoy, Swatow, Kiungchow, etc.

⁴ Cf. China, 1882, No. 2: Return giving clauses in treaties or other binding agreements at present in force between China and the United Kingdom, relating to the treatment of immigrants from either state into the territories of the other.

provision, certain classes of Chinese are prohibited by the legislatures of some treaty states or their self-governing colonies from entering their territories. The stringency of such restriction varies with the different states concerned. This prohibition, as a rule, refers to new immigrants, although in some states, *e.g.* South Africa, Chinese residents returning from China or elsewhere are re-admitted with great reluctance, and even their wives going out to join them are with extreme difficulty admitted.

United States. From the United States as well as its possessions, not merely Chinese labourers are excluded, but only specified exempt classes are admitted.¹ Now the experience of half a century has evolved many definitions by the courts as well as the legislature, and these are now accessible in convenient form for the guidance of all concerned.

"Labourer" defined. Labourers are defined by Section 2 of the 1893 Act, as follows:—"Skilled and unskilled manual labourers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation."²

Exempt Classes defined. As regards those who may be admitted, Rule 2 of the Regulations, approved January 24, 1914, provides as follows:—"Only those Chinese persons who are expressly declared by the treaty and laws relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States, and those only upon compliance with the requirements of said treaty and laws and of rules issued thereunder. The admissible classes, therefore, are teachers; students; travellers for curiosity or pleasure; and merchants, and their lawful wives and minor children; officials of the Chinese government, together with their body and household servants; Chinese persons holding the return certificate.....; those seeking in good faith to pass through the country to foreign territory.....; persons whose physical condition necessitates immediate hospital treatment; Chinese persons shown to have been born in the United States, and the wives and children of such Chinese American citizens; and seamen as provided in Rule 7."³

"Merchant" defined. One of the most fruitful sources of controversy in the courts in this connexion is the precise meaning of the term "merchant," as not a few "labourers" have attempted to

¹ See *supra*, 9-10, for Chinese emigration to the United States since 1868.

² Treaty, Laws, and Rules governing the admission of Chinese (Washington, 1914), 22.

³ *Ibid.*, 37.

enter the country under the masquerade of "merchants." The same section of the 1893 Act which defines the labourer, thus defines a merchant:—"A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labour, except such as is necessary in the conduct of his business as said merchant."¹ Accordingly, bankers are regarded as merchants," and editors as "teachers."²

"Student defined." Again, to prevent a labourer from being admitted on the plea of a "student," the latter term is defined under Rule 8, 1914, as follows:—"A student within the meaning of the treaty and laws of the United States relating to the admission and exclusion of Chinese, is a person who pursues some regular course of study, including the higher branches of learning, but not excluding the elementary or preparatory branches, if undertaken in good faith; and for whose maintenance and support as a student in the United States adequate financial provision has been made or satisfactorily assured." At the conclusion of his studies he must depart from the United States, unless by then he can be qualified to remain as one of the exempt classes.³

"Seaman defined." Moreover, it is not every seaman who may be admitted. The term is defined under Rule 7, 1914, as follows:—"Chinese employed on board vessels shall not be regarded as in any sense members of the exempt classes, but shall be considered and treated as labourers. Masters of vessels that enter ports of the United States with Chinese employed thereon shall not land, attempt to land, or permit to be landed any such Chinese employees..... *provided, however,* that such Chinese employees may be discharged or granted shore leave in ports of the United States, if the owner, master, or officer in charge of the vessel first properly executes and files with the immigration officer in charge at such port a bond with approved security in the penalty of \$500 for each such Chinese conditioned for departure from and out of the United States within thirty days, a complete personal description and a photograph of the Chinese referred to therein to be attached to said bond."⁴

Regulations. Finally, apart from the stringency of the definitions, the exclusion of Chinese is exercised under more drastic regulations than those enforced against other aliens. For example, under the general immigration law, (a) aliens applying for

¹ *Ibid.*, 22.

² *Ibid.*, 37.

³ *Ibid.*, 42.

⁴ *Ibid.*, 41-42.

admission are examined by an inspector who, if not satisfied that they are "clearly and beyond a doubt" entitled to land, detains them for examination by a board of special inquiry consisting of three inspectors; and (b) aliens found after entry unlawfully in the country are arrested and expelled by an order or warrant of the Department of Labour, after a hearing before an immigration official designated by him. Under the Chinese exclusion law, however, (a) Chinese applying for admission are examined by an inspector who reports to the immigration official in charge at the port, and the latter, not a board of special inquiry, determines whether the applicant shall be admitted or rejected; and (b) Chinese found after entry unlawfully in the country are arrested, either on a warrant of the Department and given a hearing of the character above referred to, or they are arrested under a warrant issued by a judge or commissioner, usually the latter, and given a judicial or quasi-judicial trial to determine whether they are entitled to be and remain in the country.¹

Australasia. From Australia and New Zealand Chinese are excluded, if they fail to pass a dictation or reading test. In the case of Australia, the test consists of writing out "not less than fifty words in any prescribed language."² Now, the prescribed language may be any European stock; but the authorities frankly state that in general practice, the dictation test is not imposed upon persons of European race."³ A limited exemption is, however, created in favour of Chinese students or merchants, under which they may be admitted for a period of twelve months or more, if necessary; but the latter term includes "only persons engaged in promoting the wholesale oversea trade between China and Australia."⁴

In the case of New Zealand, the test consists of reading "a printed passage of not less than one hundred words of the English language," selected at the discretion of the customs collector or principal immigration officer.⁵

Canada. As regards the Dominion of Canada the restriction is relaxed, and any Chinese may be admitted upon his payment of a poll-tax of \$500 or £100.⁶ If he leaves the Dominion and re-enters it within twelve months,

Poll-Tax.

¹ Bouvé, *passim*; 26 Harvard Law Review (1913), 662-664.

² Art. 3 (a), Immigration Restriction Acts, 1901-1910.

³ Australian Official Year-Book, 1915, No. 8, 1056.

⁴ Australian Commonwealth, Command Paper, 1912, No. 41.—F. 13948.

⁵ Art. 42, Immigration Restriction Act, 1908; New Zealand Official Year-Book, 1914, 99-100.

⁶ Sec. 7, Chinese Immigration Act, 1906; Canadian Official Year-Book, 1914, 84-85. This tax was originally assessed at \$50, or one-tenth of the present amount.

he is entitled to free entry on substantiating his identity. If the re-entry takes place after a year, the tax will again be paid as if he were a first arrival.¹

Prohibited Immigrants. The person admitted may be a labourer or otherwise, so long as he is able to pay the tax. He must, however, not belong to any of the following classes who are prohibited from landing under any circumstances:—Namely, a person who is “(a) a pauper, or likely to become a public charge; (b) an idiot or insane; (c) suffering from any loathsome, infectious or contagious disease; (d) a prostitute, or living on the prostitution of others.”²

Exempt Classes. As the Act applies primarily to labourers, the under-mentioned are entitled to be exempted from the payment of the poll-tax:—

(a) “The members of the diplomatic corps, or other government representatives, their suites and their servants, and consuls and consular agents.”

(b) “The children born in Canada of parents of Chinese origin and who have left Canada for educational or other purposes, on substantiating their identity to the satisfaction of the controller at the port or place where they seek to enter on their return.”

(c) “Merchants, their wives and minor children; the wives and minor children of clergymen; tourists; men of science; (subject to such regulations as may from time to time be made by the Governor in Council) duly certified teachers; who shall substantiate their status to the satisfaction of the controller, subject to the approval of the Minister, or who are bearers of certificates of identity, or other similar documents issued by the government or by a recognized official or representative of the government whose subjects they are, specifying their occupation and their object in coming into Canada.”³

Students. If the person desiring admission is a student, he will be treated differently. At the port or place of entry he will, as a non-exempt, pay the tax, but on proof of good faith the amount will be returned to him after twelve months. And to entitle him to such a refund he must “satisfy the controller that he is entering Canada for the purpose of securing a higher education in one of the recognized universities, or in some other educational institution,” and afterwards “furnish satisfactory proof that he has been a *bona fide* student in such university or educational institution for a period of one year.”⁴

¹ Sec. 21, Chinese Immigration Act, 1906.

² Sec. 18.

³ Sec. 7; sec. 2, Amending Act, 1908.

⁴ Sec. 3, Amending Act, 1908.

“Merchant” defined. A “merchant” is ambiguous; so Section 4 of the Chinese Immigration Act, 1906, provides as follows:—
 “ ‘ Merchant,’ as used in this Act, shall not include any merchant’s clerk, or other employee, mechanic, huckster, pedlar or person engaged in taking, drying or otherwise preserving fish for home consumption or exportation.”

South Africa. By far, however, the most stringent exclusion is exercised in South Africa. For, whereas from the United States only “labourers” are excluded, all classes of Chinese, except officials, are refused admission into the Union of South Africa. This exclusion is exercised under the power vested in the Immigration Department to deny admission to (a) “any person or class of persons deemed by the Minister on economic grounds, or on account of standard or habits of life, to be unsuited to the requirements of the Union or any particular province thereof;” and (b) any person who fails to pass the dictation test “in any European language,” including Yiddish.¹

As regards the latter requirement the Act, however, does not mention the number of words required to satisfy the immigration officer or, if the Chinese immigrant appeals, the immigration board. Accordingly, these officials are invested with full discretionary powers for the purpose of excluding all “undesirable” aliens. In addition, it is to be noted that the immigrant officers require very strict proofs of identity as well as relationships before the wives or children of Chinese already resident within the Union will be admitted.

§ 38. IMPERFECT RIGHTS OF CHINESE RESIDENTS ABROAD.

So much for the exclusion of Chinese. As regards those who are already residing in the territories of foreign states, we find that in some their rights are not perfect. Such imperfect rights fall under two headings: namely, restrictions upon the right of residence and restrictions upon the right of trade. These occur generally in the states admission into the territories of which either one or more classes of Chinese are prohibited.

The United States: As in our discussion of Chinese exclusion laws, we will first take the United States. In 1906, the state legislature of California enacted that Chinese as well as Japanese children should not be permitted in the ordinary schools for white children, but should instead be segregated in special Oriental Schools.² Japan protested and eventually some

¹ Art. 4, Immigrants Regulation Act, 1913, in Statutes of Union of South Africa (1913), 214.

² Art. 10, sec. 1662, School Law.

sort of settlement was arrived at between the Tokyo and Washington government.

**Repugnant to
American
Treaty,
1868.**

Now, this legislation is an unfair discrimination, founded on racial prejudices. As regards the Chinese it is repugnant to Articles VI and VII of the treaty of 1868, which read as follows:—"Citizens of the United States visiting or residing in China, shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favoured nation; and, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favoured nation. But nothing herein contained shall be held to confer naturalizations upon citizens of the United States in China, nor upon the subjects of China in the United States. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the government of China; and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favoured nation."

**Instances of
Similar En-
actments
Invalidated.**

Apart from treaty violation, the enactment under discussion is also *ultra vires* or unconstitutional. As such it is untenable, since similar legislation in the past has repeatedly been invalidated. For example, in 1880, the same state prohibited all aliens incapable of becoming electors therein from fishing in its waters. In *In re Ah Chong*¹ this statute was declared of no effect, because, taken in conjunction with contemporaneous ordinances discriminating against the Chinese, it infringed upon the above treaty of 1868. Said Chief Justice Sawyer of the District Court of California:—"To exclude the Chinese from fishing in the waters of the state, while the Germans, Italians, Englishmen and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are enjoyed by the citizens or subjects of the most favoured nation; and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with immunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favoured nation;' and such discriminations are

¹ 6 Sawyer, 451, 455.

in violation of Articles IV and VI of the treaty with China. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinese by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges whose governments have treaties securing to them the enjoyment of all privileges granted to the most favoured nation."

Yick Wo v. Hopkins. Similarly, in 1886, it was held by the United States Supreme Court, in *Yick Wo v. Hopkins*,¹ that if Chinese had the right temporarily or permanently to reside within the United States, they were entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws; and that if an administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits made arbitrary and unjust discriminations, found on differences of race, between persons otherwise in similar circumstances, it violated the provisions of the Constitution.

In Re Lee Sing. Accordingly, it was decided, among others, in *In re Lee Sing* (1890),² that an ordinance of the city of San Francisco was a treaty contravention, which declared it to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in a certain prescribed district, and which required all Chinese inhabitants theretofore located outside of the prescribed district to remove within a specified time.³

Right of Education. Then there is still another aspect to this question of educational right. It was suggested at the time that the segregation of Asiatic children in Oriental schools was no hardship, since the state was under no obligation to furnish education to aliens whatsoever. And, if in this case special education was provided, such accommodation was an act of courtesy with which it would be ill grace to find fault. These as well as other pertinent suggestions were reviewed by Hon. Elihu Root, then Secretary of State, in an address at the annual meeting of the American Society of International Law, April 19, 1907. And with his **Secretary Root's Opinion.** remarks we propose to leave the subject. He said:—"The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien

¹ 118 U. S. 356.

² 43 Fed. 359.

³ For other cases, see Crandall, 253-257, 417-419, 471-483.

residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made, and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education.....To secure the citizens of one's country against discriminatory laws and discriminatory administration in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief objects of treaty making, and such provisions always have been reciprocal.....Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No state can set up its laws against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the President and Senate in exercising a power committed to them and prohibited to the states by the Constitution." ¹

Mixed Marriages.

Finally, there is also a special kind of discrimination. In twenty-seven of the American states and territories mixed marriages between the white and coloured races are prohibited. In some of the prohibitions Chinese are expressly mentioned: thus Nevada includes "black persons, mulattoes, Indians, Chinese;" Oregon, "negroes, Chinese, or persons having one fourth or more of negro, Chinese, or Kanaka blood, or more than one-half Indian blood." If a mixed marriage is contracted in any of the remaining twenty-three states and territories which enforce no such legislation, it will not be recognised as valid by the former states.²

¹ Crandall, 257-258.

² Cf. Gilbert T. Stephenson, on Race Distinctions in American Law, in 43 Am. L. Rev. (1909), 366-379.

Treaty Violation.

Now, such prohibition is also a discrimination founded on racial differences. It is true that it is, perhaps, not so invidious as the enactments we have already discussed, but it is none the less a discriminatory measure which entails hardships on the Chinese residents. It violates the spirit, if not the letter, of the stipulation that "Chinese subjects.....shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favoured nation." If other aliens are entitled to be immune from disabilities or discriminations, then under the stipulation the Chinese are also entitled to the enjoyment of such immunity or privilege. The fact that the prohibitions have been sustained by the federal as well as the state courts does not alter the more vital fact that the legislation in question is a discrimination in violation of *Green v. State*.¹ the treaty stipulations. In *Green v. State*,¹ for example, it was held that "marriage is not a mere contract, but a social and domestic institution upon which are founded all society and order." Therefore, it was "to be regulated and controlled by the sovereign power for the good of the state." Now the foregoing may be true, but it remains that the regulation is a denial to the Chinese of an immunity which is "enjoyed by the citizens or subjects of the most favoured nation."

Prohibition Unsound.

Besides, the object of the prohibition seems to be unsound. From the point of view of "society and order" it may be undesirable to allow intermarriages between mixed races, but the remedy by prohibition leaves much to be desired. If mixed marriage is an evil, then the cure is to educate public opinion to appreciate its injurious effects. And if public opinion is not in favour of mixed marriages, the latter will die a natural death, and the ordinance will be superfluous. Whereas, to prohibit the same is to create an artificial sense of danger and at the same time expose the races discriminated against to unfair hardships. The contemplated evil is not cured, but new evils are created, and the second state of the proscribed races is worse than the first. Under the circumstances the prohibition is also untenable.

Canada.

Next, we come to the status of Chinese in Canada. Here the restrictions are of another character, and they occur chiefly in the provinces of Saskatchewan and Quebec.

Saskatchewan Female Labour Act.

In 1912, the state legislature of Saskatchewan enacted that, "no person shall employ in any capacity any white woman or girl, or permit any white woman to reside or lodge in or work in or, save as a *bona fide* customer in a

¹ 58 Alabama Sup. Court, 190.

public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept, or managed by any Japanese, Chinese, or other Oriental person.”¹ Subsequently, the act was amended, and the words “Japanese” and “or other Oriental person” were omitted.² Now this legislation is directly discriminatory against the Chinese, and so a test case was taken under it. But its constitutionality was upheld by the Supreme Court of that province *R. v. Quong Wing*,³ in *Rex v. Quong Wing*,³ as follows:—“While the legislature has interfered with the rights which Chinese might have to carry on business as residents of the country, yet the act was obviously intended for the protection of white women, and was, therefore, in the nature of a police regulation.”

Dissenting Judgment. The above was decided by a majority of the court; Chief Justice Haultain, however, dissented from the other three judges. In *The Union Colliery Co. of British Columbia v. Bryden*,⁴ an enactment of British Columbia, that “no Chinese shall be employed, or allowed to be for the purpose of employment, in any mine to which the Act applies, below ground,” was held *ultra vires*; but in *Cunningham v. Tomey Homma*,⁵ an enactment of the same state, that “no Chinese, Japanese, or Indian shall have his name placed on the register of voters for any electoral district or be entitled to vote at any election,” was held *intra vires*. Now, in the case under discussion, the majority judges took the view that they were bound by the later decision of the Privy Council, whereas the Chief Justice took care to indicate that those two cases were not analagous. For in the *Cunningham* case, Lord Chancellor Halsbury himself observed as follows:—“That case (*Bryden*) depended upon totally different grounds. This board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and in effect to prohibit their continued residence in that province. It is obvious that such a position can have no relation to the present question whether any naturalised person has an inherent right to the suffrage within the province in which he resides.” Therefore, said Haultain, C. J.:—“Both the reasoning and the decision in *Bryden’s* case, in my opinion, apply to the enactment now under consideration. The regulations which are here impeached are not really aimed at the

¹ Statutes of the Province of Saskatchewan, 1912, 77.

² *Ibid.*, 1912-1913, 61.

³ 6 Saskat. Law Rep., December, 1914, 242-259.

⁴ 1899 A. C. 580.

⁵ 1903 A. C. 151.

regulation of restaurants, laundries, and other places of business and amusement, or of the employment of female labour, but were devised to deprive the Chinese, whether naturalised or not, of the ordinary rights of the inhabitants of Saskatchewan. The right to employ, the right to be employed, the right to own property and to own, manage, or conduct any business without being subjected to unequal and discriminatory restrictions are just as truly ordinary rights of the inhabitants of Saskatchewan as the right to work.....It is aimed exclusively at Chinese, and imposes unequal conditions upon them. The argument on this point was not pressed very strongly upon us, and Mr. Willoughby¹ relied almost altogether on the other ground, that the Act is *ultra vires* of the provincial legislature as conflicting with the exclusive jurisdiction of the Dominion in the matter of naturalisation of aliens."

Case discussed. From the foregoing it is obvious that the ostensible ground of decision of the other three judges was that the Act was a police regulation, designed for the protection of white women. It may, however, be questioned if the regulation constitutes a proper use of the alleged police power. For example, in 1911, the state legislature of Massachusetts, U. S. A., attempted to enact that it would be a misdemeanour for women under the age of 21 to enter a hotel or restaurant conducted by Chinese, or for the proprietor of any such hotel or restaurant to admit thereto women under that age. The Supreme Judicial Court of that state, however, decided that the prohibition was unconstitutional. Said the court:—"By the strict terms of the proposed law it would be a criminal offence for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons, although of the proscribed class founded wholly upon their race and nationality.....There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils in the interest of morality. This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offence against order, decency or morality. This legislation

Chinese Restaurants in Massachusetts.

Improper Exercise of Police Power.

¹ Counsel for the defendant. For particulars of the case, the author is indebted to Hon. A. Turgeon, Attorney-General, Regina.

does not refer to the character or the condition of the hotel or restaurant that the young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power.”¹

Summary. Now, *mutatis mutandis*, this language may well be applied here. The ordinance is an unjust discrimination, because it constitutes an improper exercise of police power. It refers only to the nationality of the person who conducts the business, without forbidding anything which is necessarily evil in itself. It puts obstacles in the way of a Chinese earning his livelihood, while other aliens are not so handicapped. Under the circumstances, it is a violation of the treaty stipulation that the subjects of one shall enjoy within the territories of the other contracting party, full protection in life and property.

Quebec Laundry Act. So much for Saskatchewan. As regards Quebec, the legislature of that province passed an act, in 1915, to amend the former licence law. It provides that any person owning a public laundry should pay a provincial tax of \$55 or £11; but a public laundry is not to include “the shop, dwelling of a laundress, who, either alone or with members of her family, washes or irons therein for a profit, linen brought or sent there by the public; nor the shops, dwelling or buildings occupied by charitable religious communities, or by incorporated companies paying the provincial tax upon corporations, and in which linen, brought or sent there by the public, is washed or ironed for a profit.”²

Wong Sing v. Bedard. As in the Saskatchewan Female Labour Act, a test case was similarly taken, and here also the legislation was upheld. In *Wong Sing v. Bedard*, the Superior Court of Montréal decided as follows:—“The provincial legislature has the right to impose a tax, even with discrimination, provided that the act itself relates to a matter within the jurisdiction of the province. As it is said by Chief Justice Strong in a case, we have not in the British North America Act of 1867 provisions such as those contained in the Constitution of the United States, which require that all taxes and imposts, of whatever nature they may be, shall be uniform in the United States. It is not necessary for me to decide if the act in question discriminates justly or unjustly. In face of the principles announced.....I am of the opinion that the law is constitutional.”³

¹ 45 Am. L. Rev. (1911), 911-912.

² 5 Geo. V, Chap. 22, sec. 2; Statutes of Quebec, 1915.

³ *Per* Judge Panneton, Sept. 15, 1915. For the above information as well as other particulars, the author is indebted to Hon. W. Scott, Chief Controller of Chinese Immigration, Ottawa.

Act discussed. Now, on the face of it the legislation under consideration does not appear to be so invidious as that of Saskatchewan. It is applicable to public laundry proprietors of all nationalities, and a Chinese can either get his wife to open the shop for him or register his concern as an incorporated company. These shops, however, are owned practically wholly by Chinese, whereas the laundresses exempted under the act are non-Chinese. Therefore, one is not precluded from going behind the wording of the act in order to ascertain the motive of its existence. For example, in *Quong Wing v. Kirkendall*,¹ it was held by the United States Supreme Court that exempting steam laundries and women engaged in the laundry business, where not more than two women were employed, from the licence tax imposed by a state law of Montana, upon the laundry business, did not deny the equal protection of the laws to a man operating a hand laundry. Said Mr. Justice Holmes:—"A state does not deny the equal protection of the law merely by adjusting its revenue laws and taxing system in such a way as to favour certain industries or forms of industry.....Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the Constitution does not allow. (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064). It is a matter of common observation that hand laundry work is a wide-spread occupation of Chinese in this country, while, on the other hand, it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case."

Opportunities of Earning Livelihood Denied. From the nature of the circumstances, the statute is one which is calculated to deny to the Chinese the opportunities of earning a livelihood—a denial from which other aliens are exempt. Since he has heretofore to pay an annual licence fee of \$50, the additional imposition of \$55 appears to be harsh in operation, and in effect to prohibit his continued residence in that part of the Dominion by placing obstacles in his way of earning a living. This view of the case is brought out in a recent suit before the United States Supreme Court. On December 14, 1914, the state of Arizona enacted that every employer (whether corporation, partnership, or individual) who employed more than five workers at any one time, "regardless of kind or class of work, or sex of workers," should employ "not less than eighty per cent. qualified electors or native-born citizens of the United States or some subdivision thereof." This, the Supreme Court held

¹ 32 Supreme Court Rep. 193; 46 Am. L. Rev. (1912), 750 751.

Truax v. Raich. in *Truax v. Raich* (November 1, 1915), was invalid and *ultra vires*. Said Mr. Justice Hughes:—"It is an act aimed at the employment of aliens, as such, in the business described.....It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the Fourteenth Amendment to secure.....If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labour is necessarily involved.....The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.....The discrimination is against aliens as such in competition with citizens in the described range of enterprises and, in our opinion, it clearly falls under the condemnation of the fundamental law."¹

Municipal Law and Treaty Right. Now, the decision in *Wong Sing v. Bedard* rests on pure municipal law. Each province is entitled "to impose a tax, even with discrimination," and therefore it was not necessary for the court "to decide if the act in question discriminates justly or unjustly." Here we have a conflict between municipal law and treaty right, a topic which we shall discuss presently. It is true that in the British Empire the treaty right of the Chinese is never so precisely defined as it is in the

¹ Crandall, 421-422.

United States, but it appears that even under the present loosely defined right to the full protection of the law which the treaty-making sovereign of the Dominion has guaranteed in its treaties with China, he is entitled not to be discriminated against. The territorial government has admitted him into its territory, and therefore it is ungenerous for the local authorities to handicap him in his chances of earning a livelihood. If the provincial legislature wishes to favour its own citizens, let it discriminate against all aliens alike. If the discrimination falls on a certain class or race only, then the latter "instead of enjoying in a substantial reason and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality." It is to be regretted, therefore, that the learned judge did not see fit to decide if the statute discriminated justly or unjustly.

South Africa. So much for Canada. In South Africa the disabilities of Chinese residents are, perhaps, most irksome. Their harshness is manifest, and in the light of our previous discussion, no further comment is here necessary. Being comprehended under the categories of "Asiatics" and "coloured people," they are required to live or carry on business within certain streets, wards or locations designated by the municipal government.¹ They may not acquire in any province of the Union where their residence is unlawful, any interest in land, whether leasehold or freehold, or in any immoveable property.² They may not use the same post-offices, tramcars, or railway carriages as those used by Europeans.³ They may not make use of the side-walks or stoeps serving as such, in public thoroughfares;⁴ nor may they engage in mining or deal in precious metals.⁵ The municipal authorities are invested with large powers in respect of granting or refusing trade licences, especially for unpretentious occupations.⁶ Finally, they may not be enrolled on the list of municipal voters,⁷ or be about the streets after 9 p.m.⁸

§ 39. CHINESE DISCRIMINATION FROM THE POINT OF VIEW OF TREATY OBLIGATIONS.

Treaty Obligations. Now, these restrictions and discriminations cannot be reconciled with the treaty engagements between China and the states concerned. As we have already shown, they constitute

¹ 1 Statute Law of Transvaal, 173-174; Transvaal Ordinances, 1911-1912, 154.

² 2 Statutes of Union of South Africa, 1913, 228.

³ 1 Transvaal, 374; Transvaal Ordinances, 231.

⁴ 1 Transvaal, 433.

⁵ 3 Transvaal, 2291.

⁶ Transvaal Ordinances, 163-188.

⁷ *Ibid.*, 197.

⁸ 1 Transvaal, 173.

a serious negation of the guarantee that the citizens or subjects of one contracting party shall enjoy within the territory of the other contracting party full protection in person and property. They deny to the Chinese the complete protection of the laws predicated by that treaty engagement, and the status of the victims becomes that of the citizens of the least favoured instead of the most favoured nation. The case resolves itself into one of treaty violation and a disregard of treaty obligations. If so, the phenomenon is not conducive to the growth of international law.

United States. In the treaties we have mentioned between China and the United States, the stipulations are precise; therefore, the duty of the latter is clear and unambiguous. Accordingly, the restrictions and discriminations against the Chinese should be removed, so that respect may really be paid to the sanctity of treaty obligations.

Great Britain. As regards Great Britain, the obligation not to discriminate is perhaps more implied than express. But if lawfully admitted Chinese are to be discriminated against, the engagement to accord them full protection in person and property is devoid of meaning. Furthermore, the right to the equal protection of the laws is meant to be reciprocal. The subjects of Great Britain in China enjoy the rights, privileges and immunities of the most favoured nation; therefore, reciprocally, Chinese in British dominions and self-governing colonies are entitled to the like treatment of those of the most favoured nation.

**Musgrove
v. Chun
Teeong
Toy.** It is true that the Judicial Committee of the Privy Council has declared in *Musgrove v. Chun Teeong Toy*, that no alien excluded from British territory—to wit, Victoria, N. S. W.—could maintain his right of entry in a British court of law; nevertheless, the court in that case felt constrained to refer to matters of international comity. Said the board:—“Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native. But it is quite another thing to assert that an alien excluded from any part of Her Majesty’s dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their Lordships in the present appeal.....whether the proper officer for giving or refusing access to the country has been duly authorised by his own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise the authority by which the Crown had a right to exercise through the colonial

government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien, refused permission to enter British territory, can in an action in a British court compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies.”¹

International Good Faith. Such restrictive legislation having dated from 1880, when the laws restricting Chinese immigration into British dominions were first passed, it may perhaps be argued that China has in effect acquiesced in its legality; but the assumption cannot reasonably be seriously advanced. International good faith between two contracting states is directly involved here, and no alleged right of prescription or pronouncement of a national tribunal can be invoked to evade or disregard a treaty obligation. “But it must be emphasized that subsequent municipal law can certainly have no such influence. On occasions, indeed, subsequent municipal law creates for a state a conflict between its treaty obligations and such law. In such case this state must endeavour to obtain a release by the other contracting party from these obligations.”² It is universally conceded that each state has the right to admit or exclude whomsoever it pleases, or to legislate upon the necessary measures thereunder.³ But it is equally recognised that if the municipal laws of a state conflict with the international obligations contracted by that state, the latter must prevail.⁴ The national courts, of course, must administer the municipal law; but the government concerned must, in a case of conflict, as in the one under consideration, negotiate with the other contracting party for a release from that treaty obligation. Pending that release, however, such international obligation must be respected.

Question of Retaliation. It is open to each state to arrange with China respecting the restriction, suspension, or regulation of Chinese immigration into its territory; but until such an agreement has been concluded, China may with good grounds take objection to the discriminations and restrictions enforced against its subjects, and perhaps adopt counter measures in the interests of its subjects in its own territory. “Compelled to admit all British subjects on favourable terms, under treaties that have never been modified, she has to watch in silence whilst her own subjects are rigidly excluded from many parts

¹ 1891 A. C. 272-283.

² Oppenheim, I., 578.

³ Cobbett, I., 196-198.

⁴ *Whitney v. Robertson*, 124 United States, 190; Moore, V, § 774.

of the British dominions.....If, in the future, as China and Japan develop, either or both of these countries should assert the right to a similar policy of exclusion, it must not be expected that the people of Great Britain would in such a case insist on the Chinese, or Japanese, government renouncing any claim to such a right."¹

Self-defence. According to the present treaties every alien has a right to enter China, however undesirable or depraved he or she may be. Now it is the unprincipled alien who disturbs the peace by his unbridled acts, especially when far removed from the vigilance of his consul. When this does occur, a series of transactions is initiated, the consequences of his rights of extraterritoriality. And, in the end, the sufferer is, not the original cause of the disturbance, but the local authorities, because the latter is unable to preserve the peace! Hence, it is becoming a serious question whether China should not in self-defence rigorously exclude such an undesirable alien at the port of entry, rather than deport him after he has entered and run amok. Prevention is better than cure, and, *mutatis mutandis*, China may similarly deny the right of admission to "any person, or class of persons, deemed by the Minister on economic (as well as other reasonable) grounds, or on account of standard or habits of life, to be unsuited to the requirements" of the Republic.

¹ Eames, 583.

CHAPTER II

RIGHT TO UNIFORM TARIFF

§ 40. DEFINITION.

All alien merchants importing goods into China, or exporting therefrom, are required to pay the dues or duties established by the treaty tariff. Each is entitled to have his goods assessed at no higher rate than is imposed upon or paid by those of other alien or, in some cases, native, merchants; nor is he to be required to pay additional levies thereto. This is known as the most-favoured-nation treatment. Moreover, the duties leviable on imports and exports will be collected by standardized methods common to all the ports,¹ so as "to secure uniformity and prevent confusion."²

Weights and Measures. Accordingly, all goods will be measured by a standard set of weights and measures, with their foreign equivalents as follows:—

One Picul = 100 catties = $133\frac{1}{3}$ pounds avoirdupois = 60 kilogrammes and 453 grammes.

One *Chang* = 10 Chinese feet = 141 English inches = 3 metres and 55 centimetres.

One *Ch'ih* = 10 Chinese inches = $14\frac{1}{10}$ English inches = 355 millimetres.³

Board of Arbitration. If a dispute should arise between the foreign importer and the customs authorities regarding the value or classification of goods, the case may be referred to a board of arbitrators composed as follows:—(a) an official of the customs; (b) a merchant selected by the importer's consul; and (c) a merchant, differing in nationality from the importer, selected by the senior consul of the port. The board will decide by a majority vote, and its decision will be binding on both parties. "Should the board sustain the customs valuation, or, in the event of not sustaining that valuation, should it decide that the goods have been undervalued by the importer to the extent of not less than $7\frac{1}{2}\%$, the importer will

¹ Art. 10, British 1858, Tariff Rules.

² Art. 34, British 1858.

³ Art. 4, British 1858, Tariff Rules; art. 4, French 1858, Tariff Rules.

pay the fees (namely, ten Haikwan taels for each merchant arbitrator); if otherwise, the fees will be paid by the customs. Should the board decide that the correct value of the goods is 20% (or more) higher than that upon which the importer originally claimed to pay duty, the customs authorities may retain possession of the goods until full duty has been paid, and may levy an additional duty equal to four times the duty sought to be evaded.”¹

§ 41. AMOUNT OF LEVY AT THE TREATY PORTS.

Generally, 5% *ad valorem*. As a general statement it may be said that the amount of levy on goods entering or leaving, in the first instance, any open port is five per cent. *ad valorem*.² According to the new import tariff, revised in 1902,³ however, certain imports are now assessed on their specific values. This is established in pursuance of Article VI of the 1901 protocol, which provides as follows:—“All the duties on importations levied *ad valorem* will be converted into specific duties, as far as it is possible to do so and with the least delay. This conversion will be established as follows:—The average value at the time of their disembarkation during the three years, 1897, 1898, 1899, will be taken as the basis of the valuation—that is to say, the value on the market, deduction being made of the import duties and the accessory expenses.”

Drawback and Coast-trade Duty. When duty has once been paid on imported articles, they may be re-exported within three years, without further payment, if they are destined for another open port; or the merchant may apply for a drawback or refund of the amount originally paid, if the goods are bound for a foreign port.⁴ If the goods are intended for the coasting trade, they will on departure from an open port pay the usual export duty of 5%; and on arriving at another Chinese port they will pay, not an import duty, but half that rate or 2½%, “as representing the transit dues which must have been paid on inland transit.”⁵ On the other hand, if goods enter China by the overland route from Russia, Burmah, Annam, or Korea, they are dutiable to the extent of about two-thirds of the levy at the treaty ports.

Excise Tax. In addition, an impost will be collected on the articles manufactured by the alien merchant, “provided that such tax shall neither be other than that payable by the Chinese

¹ Art. 1, 1902 Import Tariff Rules.

² *Ibid.*

³ Treaties, I., 377-400, 737-740.

⁴ Art. 45, British 1858; art. 21, American 1858; art. 5, sec. III, British 1876.

⁵ Morse, 578.

subjects, nor higher.”¹ On the abolition of the *li-kin* system, “an excise, equivalent to double the import duty as laid down in the protocol of 1901, is to be charged on all machine-made yarn and cloth manufactured in China, whether by foreigners at the open ports or by Chinese anywhere in China,” subject to a rebate of either the import duty and two-thirds of the promised import surtax on raw cotton imported from abroad, or of all duties, including the consumption tax, paid on Chinese raw cotton used in mills throughout China.²

§ 42. TRANSIT DUTY.

Two and a half per cent. An alien merchant may dispose of his merchandise at the port of entry, or in an inland market; or he may repair to the interior and purchase native goods for exportation to foreign ports. In either case he is required to pay the various charges on his goods in actual transit. If he prefers to pay these dues in one single instalment, he has the option so to do, and the certificate of payment will exempt his goods from all further imposts *en route*.³ This commutation transit tax is calculated at the rate of $2\frac{1}{2}$ per cent. *ad valorem*, or a half-tariff duty.

§ 43. LI-KIN.

Under the term “li-kin” is denoted the different forms of inland taxation on native products. To the foreign merchant this imposition is a continual source of complaint; accordingly, he has the option to protect his goods therefrom by the payment of the aforementioned commutation tax or transit duty. But within the area included in an international concession or settlement, such a tax will not be levied or collected.⁴

Question of Abolition and Compensation. In the Mackay treaty⁵ the Chinese government undertakes to abolish the *li-kin*, so soon as the other treaty powers will likewise act upon the engagements of Great Britain. In return for the abolition, the British government consents “to allow a surtax, in excess of the tariff rates for the time being in force, to be imposed on foreign goods imported by British subjects, and a surtax, in addition to the export duty, on

¹ Art. 3, Japanese 1896 (Oct. 19). In return for this levy, “the Chinese government agrees to allow settlements to be established without delay, for the exclusive use of Japanese, at Shanghai, Tientsin, Amoy, and Hankow, upon the demand of the Japanese government.”

² Art. 8, sec. 9, British 1902; art. 4, American 1903.

³ Art. 28, British 1858; art. 7, 1858 Rules.

⁴ Art. 1, sec. III, British 1876.

⁵ Art. 8, British 1902.

Chinese produce destined for export abroad or coastwise.”¹ In other words, when the *li-kin* taxation shall be discarded, the surtax will be assessed at $7\frac{1}{2}$ per cent. *ad valorem*, and foreign goods will then be dutiable on a $12\frac{1}{2}$ per cent. basis.² Moreover, in the event of abolition, China may recast the export tariff with specific duties, as far as practicable, on a scale not exceeding five per cent. *ad valorem*.³

Precedent Condition. “The condition on which the Chinese government enter into the present engagement is that all powers entitled to most-favoured-nation treatment in China enter into the same engagements as Great Britain with regard to the payment of surtaxes and other obligations imposed by this Article on His Britannic Majesty’s government and subjects. The conditions on which His Britannic Majesty’s government enter into the present engagement are:—(1) That all powers who are now, or who may hereafter become, entitled to most-favoured-nation treatment in China enter into the same engagements; (2) And that their assent is neither directly nor indirectly made dependent on the granting by China of any political concession or of any exclusive commercial concession.”⁴ Therefore, the accomplishment of this reform is conditional upon the assent of all treaty powers, failing which its chances of success seem remote.⁵

Inadequate Compensation. Now the compensation for “the abolition of the *li-kin* system in China and the abandonment of all other kinds of internal taxation on foreign imports and on exports” is meagre and inadequate. Accordingly, no steps have yet been taken towards its fulfilment. Besides, apart from Great Britain, the United States, and Japan, the other treaty states do not appear to be willing to conclude similar conventions with China. In view of the success of the increased *li-kin* tax on opium, which initiated in 1885, was augmented in 1911,⁶ it may reasonably be hoped that the treaty powers will consent to the levy of a surtax higher than that of seven and a-half per cent. In the interests of trade and commerce between China and all treaty states, it is wise that there should be mutual co-operation between all concerned. For example, for the foreign merchants, it has been suggested that, given larger rights of residence and trade, etc., they might consent to an increase

¹ Preamble, *ibid.*

² Sec. 2, *ibid.*

³ Sec. 7, *ibid.*

⁴ Sec. 14, *ibid.*

⁵ In the meantime, pending the abolition, the methods of collecting *li-kin* as well as other inland dues are being standardized.—British Consular Reports, 1912, for Chinkiang, 11, and Hangchow, 10.

⁶ Art. 2, British 1885, and art. 6, British 1911, respectively. See also *supra*, 19.

of the tariff from five to fifteen per cent.¹ But the alien's rights of extraterritoriality follow him wherever he goes, and an extension of the areas reserved for foreign trade and residence will still further exempt him from the jurisdiction of the local authorities. Therefore, the inducement in the form of increased surtax must needs be attractive if China is to close with the bargain.

§ 44. DUTY-FREE AND CONTRABAND LISTS.

Foreign merchants may engage in all forms of merchandise, with the exception of those declared contraband, namely:— Gunpowder, shot, cannon, fowling-pieces, rifles, muskets, pistols, and all other munitions and implements of war; salt;² as well as morphia, or instruments for its injection.³

The following are declared exempt from the payment of import duties:—Foreign rice, cereals, and flour; gold and silver, both bullion and coin; printed books, charts, maps, periodicals, and newspapers. But “a freight or part freight of duty-free commodities (gold and silver bullion and foreign coins excepted) will render the vessel carrying them, though no other cargo be on board, liable to tonnage dues. Drawbacks will be issued for ship's stores and bunker coal when taken on board.”⁴

§ 45. MARITIME CUSTOMS.

Administra- “It being, by treaty, at the option of the Chinese
tion. government to adopt what means appear to it best suited to protect its revenue, accruing on British trade, it is agreed that one uniform system shall be enforced at every port. The high officer

¹ “The foreign merchants without exception agree that the tariff revision which grants China any increase of revenue (from 5 to 15%) must include the following as a *quid pro quo*:—(1) extended rights of residence and trade to foreigners; (2) removal of all restrictions on navigation on inland waters; and opening up of internal communication by railways; (3) guarantees for the immunity of foreign merchandise from further taxation, after it has paid the duties fixed by treaty.”—Lord Charles Beresford, *The Break-up of China* (1900), 405.

² Art. 3, 1858 Rules; art. 3, 1902 Rules; 26 Commercial Treaties, 57-61.

³ Art. 11, British 1902; art. 16, American 1903. The prohibition of both morphia and cocaine will be enforced against the subjects of the signatories of the Hague Opium Convention, 1911.

⁴ Art. 2, 1902 Tariff Rules. Cf. Art. 2, 1858 Rules, which provides that the following may be exempt from both import and export duties:—Gold and silver bullion, foreign coins, flour, Indian meal, sago, biscuit, preserved meats and vegetables, cheese, butter, confectionery, foreign clothing, jewellery, plated ware, perfumery, soap of all kinds, charcoal, firewood, foreign candles, foreign tobacco, foreign cigars, wine, beer, spirits, household stores, ships' stores, personal baggage, stationery, carpeting, druggeting, cutlery, foreign medicines and glass and crystal-ware.

appointed by the Chinese government to superintend foreign trade will accordingly, from time to time, either himself visit, or will send a deputy to visit the different ports. The said high officer will be at liberty, of his own choice, and independently of the suggestion or nomination of any British authority, to select any British subject he may see fit to aid him in the administration of the customs revenue; in the prevention of smuggling; in the definition of port boundaries; or in discharging the duties of harbour-master; also in the distribution of lights, buoys, beacons, and the like, the maintenance of which shall be provided for out of the tonnage dues."¹

Nationality of Inspector-General. This provision is the origin of the present maritime customs, the receipts of which are hypothecated for the liquidation of the Boxer indemnity² as well as other foreign obligations.³ The service has charge of the collection of revenues from foreign trade, and for this purpose employs a large staff of employees of all nationalities. The volume of British trade having from the very start predominated, an Englishman has always been appointed to the Inspectorate-General. In February, 1898, the understanding was confirmed and, as long as British trade with China exceeds that of all other countries, "it is intended that as in the past, so in the future, an Englishman shall be employed as Inspector-General."⁴ In 1906, the administration of the customs was transferred from the Wai-wu Pu to the new Shui-wu Ch'u (Revenue Council). There were apprehensions that the existing arrangement might be modified; accordingly, the Chinese government reaffirmed the above understanding.⁵

§ 46. NATIVE CUSTOMS.

The work of revenue collection from foreign trade having been entrusted to the maritime customs, that of revenue collection from purely native trade is reserved to the native or regular customs. Under the international protocol of 1901,⁶ the native custom houses bordering on, or adjacent to, the open ports have been placed under the control of the maritime customs, so as to increase the funds of the latter for the service of the "Boxer" indemnity. The jurisdiction of the two institutions are distinct and coeval, and even after the actual abolition of the *li-kin* stations, "all native custom houses now

¹ Art. 10, 1858 Tariff Rules.

² Art. 6 (e), 1901 protocol.

³ *Infra*, § 83.

⁴ China, 1899, No. 1, 18.

⁵ China, 1906, Nos. 1-2.

⁶ Art. 6 (e), 2.

existing, whether at the open ports, on the seaboard, on rivers, inland waterways, land routes, or land frontiers.....may remain.”¹

§ 47. QUESTION OF TARIFF REVISION.

The treaty tariff may be revised every ten years, or earlier if necessary.² In this matter China is obviously at a serious disadvantage. Her products entering the ports of the treaty states are dutiable to the extent of from twenty to forty per cent., whereas she can only impose a levy of, at the maximum, an effective five per cent. on their goods. The need for a revision of the treaty tariff is urgent.³ The conversion of 1902 into specific duties was made according to the prices ruling in 1897-1899; whereas the price of commodities since those eventful days has risen considerably. Therefore, the duty actually levied to-day (we are speaking of economic conditions existing before the present European War) is less than four per cent. *ad valorem*.

Under the circumstances, the injustice done to China is great. Her claim for an early revision of the treaty tariff is incontestable. And since the treaty states have welcomed her into their charmed circle, it is only just and equitable that she should be given complete tariff and fiscal independence. Until that consummation is attained, however, and pending further agreement, the present duties should be re-converted according to the prices now ruling. Then it may be properly be said that the treaty tariff is assessed on an effective five per cent. basis.

¹ Art. 8, sec. III, British 1902.

² Art. 15, British 1902; art. 17, American 1903; art. 8, French 1885; art. 46 Portuguese 1887; art. 26, Japanese 1896. Art. 27, French 1858, however, provides for a septennial revision.

³ In 1913 the tariff was to have been revised, most of the treaty powers, including Great Britain, having promised to co-operate; in the end, however, the matter was allowed to drop unaccomplished.—Statesman's Year Book, 1916, 793.

CHAPTER III

RIGHT OF CABOTAGE

§ 48. DEFINITION.

“Chinese produce may be carried from one open port to another on paying tariff duty at the port of shipment and coast-trade duty (the amount of which shall be one-half of the tariff duty) at the port of discharge. Chinese produce brought in from another port, if re-exported coastwise within twelve months, will be entitled to a drawback certificate for the half-duty paid, and no export duty will be charged on shipment; but the one-half tariff duty or coast-trade duty will again be charged at the port of discharge.”¹

Here we have the right of the alien to carry on a coasting trade in China, a trade which is usually reserved in other countries by the territorial sovereign for his own subjects to the exclusion of all aliens.² The right of cabotage applies to all treaty states, except Mexico. Article XI of the latter’s treaty of 1899 reads as follows:—“It is, however, agreed that this concession (right of merchantmen of one state to frequent the open ports of the other) does not extend to the coasting trade, granted only to the national vessels in the territory of each of the contracting parties. But if one of them should permit it, wholly or in part, to any nation or nations, the other party shall have the right to claim the same concessions or favours for its subjects or citizens, provided said contracting party is willing, on its part, to grant reciprocity in all it claims on this point.”³

§ 49. LIMITATIONS OF PRIVILEGE.

Unauthorised Places. Foreign merchantmen may frequent all open ports, but they are forbidden to enter non-treaty ports for the purposes of trade.⁴ They are not permitted to carry on clandestine trading along the sea coast, or be engaged in the smuggling of or carriage of contraband goods in contravention of the customs

¹ Art. 44, Danish 1863.

² For example, “the coasting trade of the high contracting parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan respectively,” etc.—Malloy’s *Treaties*, II., 80-81.

³ *Treaties*, II., 1513.

⁴ Art. 6, Swedish 1908; art. 47, British 1858.

regulations as established by treaties. Upon detection or apprehension both cargoes and vessels will be liable to confiscation, and the vessels themselves expelled from the ports as well as debarred from the privilege of further trading therein.¹

Abuse of Flag. Alien vessels are not entitled without due authority to fly the Chinese flag under penalty of confiscation of both vessel and cargo. This forfeiture holds good even in the case of merchandise owned by aliens who abet or connive at the commission of the irregularity. In like manner, a Chinese vessel flying a foreign flag without authorisation will be punished upon joint investigation between the local authorities and the consul of the flag in question. If, however, it be ascertained that the alien subjects of the foreign flag so abused, "were aware of the circumstances, and took part in the commission of the irregularity," then the entire goods belonging to them and found in the ship will be confiscated, and the aliens themselves "liable to punishment according to law."²

§ 50. COAST-TRADE DUTY.

"All articles duly imported into China by Japanese subjects or from Japan shall, while being transported, subject to the existing regulations, from one open port to another, be wholly exempt from all taxes, imposts, duties, *li-kin*, charges, and exactions of every nature and kind whatsoever, irrespective of the nationality of the owner or possessor of the articles or the nationality of the conveyance or vessel in which the transportation is made."³ In other words, when foreign goods are imported and the tariff duty has been paid thereon, they may within the period of three years be re-exported to another treaty port without being required to pay the import duty on entry therein, provided the original packing remains intact.

If the goods re-exported, however, be Chinese produce brought to a treaty port from the interior, the export duty will be levied thereon. If the destination be another treaty port, then on arriving at the destination a coast-trade duty equivalent to a half-duty will be paid thereon. When the same goods are re-exported to a third treaty port within twelve months after entry, then on leaving the second port the coast-trade duty already paid will be refunded, and on arriving at the third port, the coast-trade duty will again be collected.⁴

¹ *Supra*, 102.

² Art. 5, German 1880, annex; art. 14, American 1858.

³ Art. 10, Japanese 1896.

⁴ *Cf.* Morse, Trade, 380-381.

§ 51. TONNAGE DUES.

When a vessel enters a port, it is liable to the payment of tonnage dues, which will be collected once every four months. If its registered tonnage exceeds 150 tons, the dues will be assessed at the rate of four mace per ton; if of 150 tons or under, one mace per ton.¹ If a vessel otherwise liable to such dues, leaves the port within forty-eight hours without breaking bulk, it will be exempted from such payment.² A similar exemption is made in favour of a boat employed in the conveyance of passengers, baggage, letters, articles of provision, or other articles not liable to duty, between any of the open ports, unless a freight or part freight is charged thereon;³ but a cargo-boat conveying dutiable merchandise, is liable once in four months at the rate of one mace per ton.⁴

A like exemption is made in favour of a foreign warship,⁵ or of a merchantman entering the port under stress of weather and in need of repairs.⁶ In conformity with the provisions of the Geneva conventions respecting the favourable treatment of hospital ships engaged in humanitarian work (The Hague, Dec. 21, 1904),⁷ these dues will similarly not be collected from such vessels.

§ 52. PILOTAGE.

On arriving at one of the open ports, a merchantman may engage the services of a pilot to take it into port. In like manner, after it has discharged all legal dues and duties and is ready to take its departure, it may employ a pilot to conduct it out of port.⁸ But any person acting as a pilot is required to take out a proper licence, in default of which he will be liable to a fine of Tls. 100 for each separate case.⁹

§ 53. RULES GOVERNING LOADING AND UNLOADING.

Within twenty-four hours after arrival the master of the vessel shall lodge all his papers, bills of lading, etc., with his consul, and the latter will within a further period of twenty-four hours report to the superintendent of customs the name of the vessel, its register tonnage, and the nature of its cargo. Any neglect to observe this

¹ Art. 29, British 1858.

² Art. 30, *ibid.*

³ Art. 2, 1902 Tariff Rules.

⁴ Art. 31, British 1858.

⁵ Art. 8, Swedish 1908.

⁶ Art. 6, *ibid.*

⁷ 24 Kuang-hsu, No. 1, 6; Higgins, 392-394.

⁸ Art. 35, British 1858; art. 6, Swedish 1908.

⁹ Art. 4, German 1880.

rule forty-eight hours after arrival will subject the master to a fine of Tls. 50 for every day's delay; the total, however, is not to exceed Tls. 200. The master is responsible for the correctness of the cargo-manifest, any wilful falsifying of which will subject him to a fine of Tls. 500. The permission of the customs authorities must first be obtained before the hatches can be opened or the goods discharged, and any unauthorised discharge will subject him to a fine of Tls. 500 and the confiscation of his cargo. The customs' permission must similarly be obtained before any goods can be put on board, and any unauthorised shipping will also subject the cargo to confiscation.¹

It is to be noted, however, that these fines cannot be enforced independently by the customs authorities. For, as in the case of the American bark, *Agnes*, which we have already noted,² proceedings for their execution must be had through the consular courts of the nationalities concerned. But the customs may, of course, waive its claim to the right of fine or confiscation.

¹ Arts, 37-39, British 1858.

[² *Supra*, 46.

CHAPTER IV

RIGHT OF NAVIGATION OF INLAND WATERS

§ 54. DEFINITION.

“British merchant ships shall have authority to trade upon the Great River (Yangtse).”¹ Thus, as in the case of the coasting trade, the alien in China is likewise admitted to a privilege from the enjoyment of which in any other country beside his own he will be excluded. The concession has been considerably extended since 1858, and to-day he may navigate the greater portion of China’s inland waters.

§ 55. REGULATIONS.

According to the Inland Waters Steam Navigation Rules of 1898,² and the supplementary regulations annexed to the British commercial treaty of 1902,³ the launch or vessel is required to register itself and take out a certificate. It may course along any waterway, unless the use of some particular shallow waterway or dams and weirs is prohibited because there is reason to fear that their use may injure the banks and cause damage to the adjoining country or the water-service of the local population. If a foreign launch is not to navigate such a channel, then a Chinese launch must also be prohibited therefrom.⁴

The steamship company is responsible for any loss caused to the riparian owners by damage which its vessels may do to the banks or works on them, as well as for the loss resulting therefrom.⁵ Both cargo and passenger boats may be towed by the steamer, but the helmsman and crew of such boats towed shall be Chinese.⁶ Since the main object of the opening of inland waterways to steam navigation is to afford facilities for the rapid transport of both foreign and native merchandise, British owners may transfer their vessels to Chinese ownership. When a Chinese company, registered under

¹ Art. 10, British 1858.

² Hertslet, II., 721-727.

³ Hertslet, I., 187-188; 388-390; Treaties, I., 374-376; II., 1352-1354.

⁴ Art. 4, 1902 Regulations.

⁵ Art. 4.

⁶ Art. 9.

Chinese law, is formed to run such steamers, British subjects may acquire shares therein; but the latter fact "shall not entitle the steamers to fly the British flag."¹

§ 56. EXTENT OF PRIVILEGE.

Routes. "A registered steamer may ply within the waters of the port, or from one open port or ports to another open port or ports, or from open port or ports to places inland,² and thence back to such port or ports. She may, on making due report to the customs, land or ship passengers or cargo at any recognised places of trade passed in the course of the voyage; but may not ply between inland places exclusively except with the consent of the Chinese government."³

Jetties and Warehouses. Its owners may lease warehouses and jetties on the banks from Chinese owners for a term not exceeding twenty-five years, with the option of renewal. Where such leases are not so procurable, the local authorities will arrange to provide them on renewable lease at the current equitable prices.⁴ The jetties are not to be erected in such positions where they will obstruct or interfere with navigation, and the assent of the nearest customs commissioner must first be obtained; but such sanction is not to be arbitrarily withheld.⁵

Appliances for Hauling through Rapids. In the upper reaches of the Yangtse river, where navigation is difficult, a foreign steamship-owner may erect, at his own expense and subject to the approval of the maritime customs, appliances for hauling through the rapids. These appliances will be at the disposal of both junks and steamers, but they must not obstruct the waterway or interfere with the free passage of junks.⁶ Moreover, "should any practical scheme be presented for improving the waterway and assisting navigation without injury to the local population or cost to the Chinese government, it shall be considered by the latter in a friendly spirit."⁷

Foreign War-ships. This right of inland navigation applies primarily to trading vessels, but it is claimed that according to Article 52 of the British treaty of 1858, the right is also applicable to foreign war vessels. That article provides as follows:—"British ships of

¹ Art. 5.

² See British Consular Reports, 1912, for Newchang, 5.

³ Art. 8, 1902 Regulations.

⁴ Art. 1.

⁵ Art. 2.

⁶ Art. 5, British 1902.

⁷ *Ibid.*

war coming for no hostile purpose, or being engaged in the pursuit of pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China, and shall receive every facility for the purchase of provisions, procuring water, and, if occasion requires, for the making of repairs.”

The Villalabos. This stipulation was accordingly appealed to when a question was raised, in 1903, between the United States admiral commanding the China station and his diplomatic colleague at Peking, whether the *Villalabos*, an American gunboat, could visit such inland waters. The former was of the opinion that such a right was exercisable, whereas the latter was not prepared to support him. Eventually, the action of the admiral was upheld by the Department of State, on the ground that “even if this right was not explicitly granted to us by treaty, Rear-Admiral Evans is unquestionably right in using it when like ships of other powers are constantly doing so.....This Department thinks, however, that Art. 52 of the British treaty of 1858 with China, which is reproduced in Art. 34 of the Austro-Hungarian treaty of 1869, gives full authority for his course.”¹

Hydrographic Investigations. Moreover, it is contended that such a right carries with it the additional permission to make hydrographic investigations in any Chinese ports. In 1890, a French man-of-war was engaged in surveying and sounding one of the closed ports. China protested, but it was unanimously held by the foreign representatives at Peking that it was a treaty right. Colonel Denby, the United States minister, for example, reported the matter to his government and remarked that, as China had no scientific officers, she had no good reason to object to the completion of the humanitarian work of sounding and charting her coasts by foreign officers, although “the great maritime countries of Europe might prohibit such surveys.” He continued:— “It happens that we are the only nation that has a treaty which by just intendment may be held to include this subject. The 9th article of the treaty of June 18, 1858, reads as follows:— ‘Whenever national vessels of the United States of America, in cruising along the coast and among the ports opened for trade for the protection of the commerce of their country, or for the advancement of science, shall arrive at or near any of the ports of China, the commanders of said ships and the superior local authorities of government shall, if it be necessary, hold intercourse on terms of equality and courtesy in token of the friendly relations of their respective nations,’” etc.²

¹ For. Rel., 1903, 85-90.

² For. Rel., 1890, 193-196. The minister's attitude was approved.

**Foreign
Attitude
discussed.**

Now the above appears to be a rather exaggerated view, since the word "port," according to the context of the treaties, refers merely to open or treaty ports. For it is only within the open ports that public ships of treaty states may be stationed for the protection of their nationals' commerce. The non-open ports, as we have already seen, are excluded from the activities of the alien merchants, and so it is meaningless to station a foreign warship therein. Of course, when a man-of-war "engaged in the pursuit of pirates," follows its quarry into a closed port, the proposition is different. Pirates are the enemies of humanity, and any effort to extirpate them deserves every encouragement. Accordingly, when a foreign warship is engaged upon such a laudable enterprise, no objection will be raised if it enters a non-open port.

Again, the work of sounding and charting the Chinese coast may be humanitarian; but the consent of the territorial government should at least be obtained. Important questions of national defence are involved in the making of such hydrographic investigations, and the consent of the territorial sovereign cannot be assumed as previously given in such a vital matter. The fact that China has a dearth of scientific officers for such purposes may be a good reason why the territorial sovereign has not been more energetic in this direction. But that consideration does not of itself entitle a foreign warship to make such investigations independently. As the American minister himself admitted, "the great maritime countries of Europe might prohibit such surveys." If so, to make such surveys in a closed port without China's leave or licence is to encroach unlawfully upon the territorial sovereign's prerogatives over his own dominions.

§ 57. LIMITATIONS OF PRIVILEGE.

Foreign merchants shall pay taxes and contributions on the warehouses and jetties leased as above, on the same footing as Chinese proprietors of similar properties in the neighbourhood. Only Chinese agents and staff may be employed to reside in these warehouses, but the merchants themselves may visit these places from time to time to look after their affairs. "The existing rights of Chinese jurisdiction over Chinese subjects shall not by reason of this clause be diminished or interfered with in any way."¹

The people living inland are not accustomed to the advent of steam vessels, and so should be disturbed as little as possible. Therefore inland waters, not hitherto frequented by steamers, "shall be opened as gradually as may be convenient to merchants, and only as the owners of steamers may see prospect of remunerative trade."²

¹ Art. 3.² Art. 7.

And if it is intended to run such vessels on new routes, the company concerned will apply for a permit through the commissioner of customs at the nearest open port to the proper officials, and the latter, in conjunction with the superior provincial authorities, will carefully consider all the circumstances of the case and then grant the application.

§ 58. PROVISION AGAINST ABUSE.

This special right of inland waters navigation may, of course, be abused. If so, the abuse will be summarily put an end to.

The provision against abuse is expressed as follows:—
 “Registered steamers and their tows are forbidden, just as junks have always been forbidden, to carry contraband goods. Infraction of this rule will entail the penalties prescribed in the treaties for such an offence, and cancellation of the inland waters navigation certificate carried by the vessels, which will be prohibited from thereafter plying on inland waters.”¹

¹ Art. 6.

CHAPTER V

RIGHT OF TRADE AND TRAVEL IN THE INTERIOR

§ 59. DEFINITION OF "THE INTERIOR."

The expression of "the interior" is defined as follows:—"The words, *nei ti*, inland, in the clause of Article VII of the rules appended to the tariff, regarding carriage of imports inland, and of native produce purchased inland, apply as much to places on the sea coasts and river shores, as to places in the interior not open to foreign trade; the Chinese government having the right to make arrangements for the prevention of abuses thereat."¹

That is to say, apart from the areas specially designated as ports or marts open to foreign trade and residence, all other places are regarded as "the interior." Such "interior" may, therefore, be situated just outside an open port along the coast or in the very heart of the country itself. The "interior" is merely contrasted with an "open port."

§ 60. PASSPORTS.

An alien may travel for pleasure or for purposes of trade,² to all parts of the interior, under a passport to be issued by his consul, and countersigned by the local authorities. "These passports, if demanded, must be produced for examination in the localities passed through." If the passport be not irregular, the bearer will be allowed to proceed, and he will be free to hire persons, animals, carts or vessels for his own conveyance or for the carriage of his personal effects or merchandise. If he be without a passport or if he commit any offence against the law, he will be handed over to the nearest consul for punishment; but he will only be subject to necessary restraint and in no case to ill-usage. Such a passport will remain valid for twelve months from the date of issue. But no passport is required if the bearer merely goes on excursions from any of the open ports to a distance not exceeding 100 *li*, and for a period not exceed-

¹ Art. 4, sec. III, British 1876.

² Art. 3 of the second Japanese treaty of 1915 (*infra*, appendix B) authorises Japanese subjects "to reside and travel in South Manchuria and to engage in business and manufacture of any kind whatever." This privilege is exceptional.

ing five days. The above, however, does not apply to crews of ships, for the due restraint of whom regulations will be drawn up between the consul and the local authorities.¹

§ 61. PASSPORT LIMITATIONS.

Apart from the provision that a passport shall not be issued to regions disturbed by persons in arms against the government,² there do not appear in practice to be any restrictions governing the issuance of such papers, although in some treaties it is provided that these may only be issued to respectable persons, or "*personnes qui leur offriront toutes les garanties désirables.*"³

Question of Protection. This omission affects the territorial authorities adversely. Under the treaties an alien is entitled to the protection of the local government; at the same time, he is clothed with the rights of extraterritoriality, the respect for which cannot but attenuate or neutralize the efforts of the local authorities in that direction. If he be found in the interior without a passport, or while there commits an offence against the law of the realm, he may only be arrested and handed over to his nearest consul for punishment, but must not be subjected to any ill-usage in excess of the necessary restraint. When, however, untoward events arise from his movements in the interior and he sustains injuries therefrom, the local officials are responsible for his security and protection. In the words of Lord Curzon:—"A very strict revision of the conditions of travel and residence in the interior is much to be desired. Some limitation ought to be placed upon the irrepressible vagrancy of European subjects over remote parts of the Chinese dominions. Passports should be absolutely refused at the discretion of the minister, exercised with regard to the character both of the locality and the applicant. When granted they might specify the name of the province, district or town to which, and to which only, the bearer is accredited. Already they give a general sketch of the route which he proposes to follow."⁴

Question of Reporting Movements. In order that the alien may be afforded adequate protection, he should therefore from time to time communicate his whereabouts to the local authorities; and having been so informed, the latter may be held accountable for any remissness on their part. This salutary measure, however, is denied to the territorial government, since the conventions provide that "these passports, if

¹ Art. 9, Swedish 1908; art. 9, British 1858. In art. 9, Swedish 1908; art. 6, German 1880; art. 6, Japanese 1896, etc., it is further stipulated that if an alien be found in the interior without a passport, he will be liable to a fine of Tls. 300.

² Art. 9, British 1858.

³ Art. 8, French 1858.

⁴ Problems, 308.

demand, must be produced for examination in the localities passed through." In reply to China's demand for some such regulations the foreign representatives admitted that, when an alien passed through a region, the local authorities might demand to examine his papers, but they could not consent to the proposition that he should report himself or his movements wherever he went.¹

The American minister, Colonel Denby, reported the above to his government and suggested that some such intimation was advisable. He said:—"On the traveller's arrival at any departmental (*chow*) or district (*hsien*) city, he may be required to report his arrival to the local magistrate, as well as the route which he proposes to follow on his departure therefrom. The traveller having given notice of his movements to the chief magistrates in the important cities, it would be their duty to notify all the subordinate officials, in the places through which the traveller would pass, of the fact that he was *en route*, and there would be no excuse for a failure to afford protection." This suggestion was regarded as judicious by the Department of State.²

Registration. In the special case of South Manchuria, however, the Japanese treaty of 1915 provides that Japanese subjects travelling in that region, are "required to register with the local authorities passports which they must procure under the existing regulations."³ The act of registration is a right step forward, although there is still much room for amelioration. The situation imposes upon the territorial sovereign an unfair hardship, and in the interests of their own nationals as well as justice to the Chinese people, it is to be hoped that either the new Japanese arrangement will be extended or that some improvement over the present procedure will be agreed upon.

No Right to Supplies. The alien, though entitled to the protection of the local authorities, is, of course, not entitled to demand from them assistance in the way of monetary contributions or supplies. In 1869, two Americans travelled without passports from Canton to Kiukiang. They posed as British officials and compelled a number of the magistrates *en route* to settle their accounts in the way of expenses for the hire of boats and carts. In the end the magistrates were reprimanded and the United States government communicated with.⁴

Again, in 1903, a German sailor travelled from Russia to Szechuan through Shensi. He succeeded in extorting from the local

¹ For. Rel., 1893, 242; 1894, 153.

² For. Rel., 1893, 241.

³ *Infra*, appendix B, treaty (B), art. 5.

⁴ 70 New Collection (General), 29.

officials, by various threats, both money and provisions for himself and his horses. The German minister was thereupon informed, when he declared that German travellers in China had a right to the protection of, but not the support by, the local authorities. Accordingly, instructions were issued to the various provincial authorities.¹

§ 62. EXTENT OF TRADING PRIVILEGE.

An alien merchant may dispose of imported foreign goods in the interior, or he may purchase native produce in the interior and convey them to an open port for exportation abroad or other open ports. If he wishes to accompany the goods himself, he is likewise required, as if he were travelling for pleasure, to take out a passport. And if he charters a boat or uses his own for conveying the merchandise, he is further required to obtain a river pass.²

§ 63. TRANSIT DUTY.

In either journey he is entitled to the option of either paying the customary inland charges leviable *en route* in the usual way, or clearing his goods of all transit duties by the payment of a single commutation tax or duty. If the articles are dutiable, the commutation tax is equivalent to one half the tariff duty for imports or exports, as the case may be; if they are duty-free, the transit tax is reckoned at $2\frac{1}{2}\%$ of their value. On the payment of either amount, a certificate will be issued to him by the maritime customs, which will operate to exempt his goods from all further inland dues or charges, "no matter how distant the place of their destination."³

Regulations.

In the case of conveying native produce under a transit pass for shipment abroad, the merchant will fill in a blank memorandum in three detachable parts, in each of which he will state his nationality, the description of produce or goods to be purchased, the first barrier of entry outward, the date of their arrival there, and the intended port of shipment; and, finally, declare that he will pay the commutation transit duty at the barrier nearest to the port of shipment. On receipt of a duplicate of the memorandum the maritime customs will issue to him a transit certificate setting forth the above particulars, which when affixed with a seal by the first barrier of entry outward, will exempt the purchased goods from all charges *en route* to the last barrier behind the port of shipment.

Being duly provided with these two papers, the trip to purchase goods in the interior may be undertaken by his Chinese

¹ 16 New Collection (Germany), 24; Koo, 274-276.

² Art. 23, British 1853; Koo, 277.

³ Art. 7, 1858 Rules; arts. 11-12, Japanese 1896.

agent, unless the merchant himself wishes to do so and provides himself with a passport therefor. When the goods arrive at the barrier nearest to the port of shipment, they will be valued by the customs officials sent thereto. The transit duty will there be paid, and then the goods may be forwarded to the port of shipment.¹

§ 64. LIMITATIONS OF TRADING PRIVILEGE.

Native Goods. When native goods are purchased in the interior, they are entitled to be protected by a transit certificate only when they are *bona fide* intended for exportation to a foreign country within twelve months from date of payment of transit tax. Those similarly purchased for consumption or sale in the open ports are subject to all the barrier charges, leviable under Chinese regulations, from the place of purchase to the port of destination.² If the native products are to be exported, the tariff export duty will first be paid thereon, since "it is distinctly understood that the payment of transit dues by commutation or otherwise, shall in no way affect the tariff duties on imports and exports, which will continue to be levied separately and in full."³ Such protected goods being intended for shipment abroad, no unauthorised sale *in transitu* will be allowed, and any infraction of this rule or attempt to pass goods through in excess of the quantity specified on the certificate, will render the goods liable to confiscation.⁴

Foreign Business Houses. As is plain from the language of the treaties, the merchant may not buy articles of foreign origin in the interior and export them to a port; nor may he tarry therein when his mission has been accomplished. Outside the areas declared open to foreign trade he may not establish any commercial houses or shops.⁵ According to Article VI of the Japanese treaty of 1896, he may "temporarily rent or hire warehouses" in the interior for the storage of the articles purchased therein or to be transported to the sea coast, "without the payment of any taxes or exactions whatever." But he may not erect permanent warehouses for such purposes.⁶

Vul-na-ro Case. Until recently the prohibitions against the establishment of foreign business houses in the interior have been more or less relaxed. In 1905, however, occurred a case which resulted in the rigorous enforcement of the treaty provisions. One Vul-na-ro, an Italian subject, had set up a saloon in Shih-chia-chuang

¹ 1 New Collection (General), 49-50; Koo, 278-279.

² Art. 4, sec. III, British 1876; art. 12, Japanese 1896.

³ Art. 28, British 1859; art. 12, Japanese 1896.

⁴ Art. 7, 1853 Tariff Rules.

⁵ See *supra*, 102-103, for the Hangchow American insurance company case.

⁶ 67 New Collection (General), 35.

(Chihli), a place not open to foreign trade and residence. When ordered to close up his business and remove to an open port, he appealed to his minister in Peking. The latter thereupon represented to the Wai-wu Pu that, as all other foreign establishments in the interior had not been interfered with from the very beginning, it was unfair to enforce the prohibition in the present instance; and, in the alternative, if Vul-na-ro was to be compelled to obey the local authorities, he should be indemnified for any losses resulting therefrom.

Chinese In reply, the Wai-wu Pu denied any liability to
Attitude. compensate the said Italian trader. He would be given six weeks to wind up his business and remove from Shih-chia-chuang; otherwise, he would be arrested and sent to the nearest Italian consulate for punishment. The Pu added that instructions in this sense had already been issued to the various provinces, as regards all other foreign trading houses illegally established in the interior. The Italian minister urged the Wai-wu Pu not to proceed with the prohibition against his national, lest there might arise "inconveniences." Undaunted by this threat, the Pu replied that as Vul-na-ro's saloon was established "obviously in contravention of treaty stipulations," China could never consent to its continuance. Moreover, the rule of limitation upon the right of foreign merchants to do trade applied to the subjects of all nations, and consequently the Italian traders suffered no discrimination by its enforcement against them. If Vul-na-ro would not obey the order to quit within the stipulated period and thereby suffer any hardships, the trouble would be invited by himself, and no "inconveniences" could possibly arise out of the case. And since China had always transacted her international affairs in accordance with treaty stipulations, there was "no need to negotiate a special arrangement on the question."

In the end, Vul-na-ro had to obey the order and remove to an open port.¹

§65. QUESTION OF AGENCY.

An alien merchant is not entitled to establish an agency in the interior.² "When a foreign firm employs a native as agent, or correspondent or salesman, or whatever we may elect to call him, to do business for the firm in the interior, such a person is simply a Chinese trader and his establishment simply a Chinese shop, notwithstanding that he may display a signboard having a Hong name identical with that of the foreign firm for which he does business, or that the business may be entirely established by the foreign firm's capital."³

¹ 33 New Collection (Italy), 3-4; Koo, 281-282.

² Art. 3, Dutch 1863; China, 1903, No. 1, 28-29.

³ China, 1903, No. 1, 29.

§ 66. QUESTION OF OPENING PEKING TO FOREIGN TRADE.

For the purposes of inland trading the capital city of Peking is excluded from the activities of alien merchants.¹

Japanese Treaty, 1903. Article X of the Japanese treaty of 1903, however, reads as follows:—"The high contracting parties hereby agree that, in case of and after the complete withdrawal of the foreign troops stationed in the province of Chihli and of the legation guards, a place of international residence and trade in Peking will be forthwith opened by China herself." Within this area "merchants of all nationalities shall be at liberty to lease land, build houses and warehouses, and establish places of business.....All roads and bridges in this place will be under the jurisdiction and control of China. Foreigners residing in this place are to observe the municipal and police regulations on the same footing as Chinese residents, and they are not to be entitled to establish a municipality and police of their own within its limits, except with the consent of the Chinese authorities."

Moreover, "when such place of international residence and trade shall have been opened and its limits properly defined, the foreigners who have been residing scattered both within and without the city walls, shall all be required to remove their residence thereto, and they shall not be allowed to remain in separate places and thereby cause inconvenience in the necessary supervision by the Chinese authorities. The value of the land and buildings held by such foreigners shall be agreed upon equitably, and due compensation therefor shall be paid. The period of such removal shall be determined in due time, and those who do not remove before the expiry of this period shall not be entitled to compensation."²

Present Anomaly. Pending the opening of Peking to foreign trade and residence, the position of the few foreign shops established around the legation quarter appears to be anomalous. Their establishment therein is illegal and "in contravention of the treaty." The foreign representatives were on several occasions approached by the Chinese government respecting their removal, but so far all attempts have failed.

Attitude of the Foreign Representatives. In the capacity of the doyen of the diplomatic body, Sir John Jordan, the British minister, replied as follows:—"Though the city of Peking has never been opened, by virtue of treaty, to foreign trade, it has become the established usage since the Boxer troubles for foreign merchants to reside and carry on business in the inner and outer cities of Peking.

¹ Art. 8, 1858 Tariff Rules.

² Annex 6, Japanese 1903.

It is observed that there are stipulations in the notes exchanged on the 10th October, 1903, between the commissioners of Japan and China for treaty revision, to the effect that after the withdrawal of the foreign troops, a place will be designated outside of the inner city of Peking for foreign trade, whither foreigners scattered both within and without the city walls shall be required to transfer themselves. No prohibition, however, being expressed, it is inferred from the foregoing that, until such designation is made, the fact of the residence and trade of foreigners is accepted. It is admitted that, during 1903, the former Wai-wu Pu declared that none of the foreign shops or warehouses opened before that date would be ordered to be closed, but that with this exception no others might be opened; but the diplomatic body never expressed its consent to the Chinese proposal. The Chinese government are, therefore, equitably estopped from objecting to the continuance of such residence and trade of foreigners already in Peking, and cannot justifiably object to other foreigners enjoying the privilege already conceded to their compatriots and other nationals.”¹

Foreign Attitude discussed. Now, the foregoing arguments appear to lack cogency. The Chinese declaration of 1903 is surely an effective disclaimer of any intention to acquiesce in such foreign trade and residence. If, thirteen years ago, the Chinese government did not expressly prohibit the continued residence of those shops opened before 1903, that silence was involuntary. Its alleged consent was overborne by considerations of the recentness of its estrangement over the “Boxer” troubles with the powers represented at Peking.

In any case, however, the prohibition upon the future establishment of such places of business is express and unequivocal, and there can be no question of estoppel, whether legal or equitable. If anything, the disclaimer of 1903 should have operated against the enjoyment of such an anomalous privilege by other late-comers. In the interests of international commerce, the opening of Peking to foreign trade and residence is to be welcomed. But pending such opening, however, it is feeble logic to suggest that the Chinese “are equitably estopped from objecting to the continuance of such residence and trade of foreigners,” etc.

§ 67. RIGHT OF INVESTMENT IN JOINT-STOCK COMPANIES.

Prior to 1902, Chinese capital could not be invested in foreign enterprises, nor foreign capital in Chinese enterprises.

¹ China, 1914, No. 1, 27-28.

**British
Treaty,
1902.**

Article IV of the British treaty of that year, however, provides as follows:—"Whereas questions have arisen in the past concerning the right of Chinese subjects to invest money in non-Chinese enterprises and companies, and whereas it is a matter of common knowledge that large sums of Chinese capital are so invested, China hereby agrees to recognise the legality of all such investments past, present and future."

**Status of
Sharehold-
ers.**

The same article further provides thus:—"It being, moreover, of the utmost importance that all shareholders in a joint-stock company should stand on a footing of perfect equality as far as mutual obligations are concerned, China further agrees that Chinese subjects who have, or may become, shareholders in any British joint-stock company shall be held to have accepted, by the very act of becoming shareholders, the charter of incorporation or memorandum and articles of association of such company, and regulations framed thereunder as interpreted by British courts, and that Chinese courts shall enforce compliance therewith by such Chinese shareholders, if a suit to that effect be entered, provided always that their liability shall not be other or greater than that of British shareholders in the same company. Similarly, the British government agree that British subjects investing in Chinese companies shall be under the same obligations as the Chinese shareholders in such companies. The foregoing shall not apply to cases which have already been before the courts, and been dismissed."

Scope of

Investment. This right of investment is not limited to joint-stock companies. According to Article IV of the Japanese treaty of 1903, it is extended to include the "organisation of a partnership or company for a legitimate purpose."¹ Moreover, Article LVII of the Law of Companies, 1904, provides that "subjects of foreign states who hold stocks in companies established by Chinese subjects, shall be held to have consented to observe and conform to the Chinese Commercial Law and the Chinese Law of Companies."²

**Chinese
Companies
in the In-
terior.**

From the language of the treaties no restriction appears to be imposed upon the locality of the Chinese company. Accordingly, an alien may invest in Chinese companies established either in the open ports or in the interior, so long as the above rules are observed. And this was so decided, some ten years ago, in a case between the viceroy of Nanking and the Ministry of Agriculture and Commerce at Peking.

¹ Cf. Art. 4, treaty (B), appendix B, *infra*.

² 16 Kuanghsü's New Laws and Ordinances.

**Attitude of
Nanking
Viceroy,
1906.**

In 1906, the viceroy held that the alien's right applied only to a Chinese company in an open port, and not one operating in the interior. He alluded to Section IX of Article VIII of the British treaty of 1902, which reads as follows:—"An excise equivalent to double the import duty as laid down in the protocol of 1901, is to be charged on all machine-made yarn and cloth manufactured in China, whether by *foreigners at the open ports or by Chinese anywhere in China*.....The same principle and procedure are to be applied to all other products of foreign type turned out by machinery, whether by *foreigners at the open ports or by Chinese anywhere in China*." Accordingly, he suggested, the alien's right was confined to the open ports and no further. Besides, "the privilege of holding stocks in Chinese manufacturing companies established in the interior is the same as that of operating industries in the interior, inasmuch as foreign merchants could therefore not only share with Chinese merchants profits derived from such industries, but could even, by reason of their investments, control such Chinese companies in the interior, or, by fraudulent combination with unscrupulous Chinese merchants, establish independent factories in the interior for themselves."

**Decision of
the Peking
Ministry.**

This opinion of the viceroy was referred to Peking, but there it was reversed. The Ministry of Agriculture and Commerce held that the alien's right of investment was applicable to a Chinese company wherever established. And in reply to the Nanking viceroy, the Ministry observed that Article LVII of the Law of Companies was enacted with due consideration to the British and Japanese treaties. Moreover, "the privilege of holding stocks in Chinese companies situated in the interior is different from, and does not carry with it, the privilege of operating manufacturing establishments in such region. And if foreign stockholders in Chinese companies should, by fraudulent devices of one kind or another, gain full control of such companies or maintain independent factories in the interior, such foreigners will be prosecuted in accordance with treaty stipulations."¹

¹ 66 New Collection (General), 11-14; Koo, 286-288.

CHAPTER VI

RIGHT OF LANDHOLDING

§ 68. EXTENT OF PRIVILEGE.

For the purposes of trade and residence an alien is entitled to rent or purchase houses from the native owners, as well as to rent or lease lands for erecting the same. The extent of the landholding privilege varies with the class of aliens entitled to such right and also the localities which contain the property. For, if the alien be a merchant, his right is restricted to the areas situated within the ports or marts declared open to foreign trade and commerce. But if he is a missionary or non-trader, his privilege is extended to embrace the interior as well as the open ports.

In both, however, the legal title to the tenure is similar, and each may acquire, not a right in fee, but a lease in perpetuity.

§ 69. PROCEDURE AT THE OPEN PORTS.

In a Foreign Settlement. In a settlement or site reserved for the trade and residence of all foreigners, the alien derives his title to the land from the territorial sovereign. He takes his lease from Chinese owners, and the deeds are stamped by the local authorities on the payment of the regulation land tax. After these formalities, the deeds are then registered with his own consulate.

Registration of Title Deeds. Now, an alien need only register his deeds with his own consulate, and not at the consulate of the state within whose jurisdiction such property is situated. For example, in 1861, one Thomas Hanbury, a British subject, acquired three lots of land within the French settlement at Shanghai. According to the usual procedure, he registered his deeds with his own consulate. In 1898, the French consul, on inspecting the deeds, declared they were irregular, as they had not been registered in his consulate in accordance with the principle of *locus regit actum*. Hanbury appealed and was sustained by the British government. In the end the French receded from their position.¹

¹ China, 1899, No. 1, 244 *sqq.*

**In a Foreign
Concession.**

In a foreign concession, that is, an area of land conveyed by the territorial sovereign to be administered by a lessee state for the residence of its subjects, the alien's title to the land is derived differently. Here it is derived from the lessee government, although the proper land tax due to the sovereign of the soil is paid indirectly, through the commutation land tax reserved to the lessor government under the grant to the lessee state of the area included within the concession. In the latter case the lessee government, being entitled to exclude from its concession all non-nationals, including Chinese, may prescribe the necessary conditions of residence and land tenure therein. And if a non-national chooses to reside in its area, he is bound by its laws and regulations, since his election of residence signifies his consent to be so bound. In which case his deeds of title to the land will be registered with the lessee government, and not at his own consulate.

**Uncertainty
Outside
Treaty Port
Limits.**

It is, however, still unsettled whether or not alien merchants can acquire lands outside of the limits of open ports. On the side of the merchants it is claimed that such a right has been conceded, on the ground that under the passport clause of the treaties, aliens need not provide themselves with passports when they make excursions to a distance of not exceeding 100 *li* beyond the treaty ports. But that provision merely applies to the making of excursions for purposes of pleasure; for, as we have already seen in Kau Ching-tong's case,¹ such a contention is untenable. Consequently, it can not be invoked to fortify the claim of establishing residences as well as trading establishments therein.

**"At Other
Places."**

In the alternative it is claimed that, as "British subjects, whether at the ports or at other places," may build or open houses, warehouses, churches, hospitals, or burial-grounds, etc., the words "at other places" are capable of extending that privilege. These words, however, have been interpreted by the British government to mean no more than to include such places as Woosung, Shameen, etc., which adjoin or serve as outlets for the open ports of Shanghai and Canton respectively, and which are generally situated within a few miles from the treaty ports.²

**Liberal Con-
struction
in Practice.**

But, in practice, it appears that the words "at other places" have in this connexion been construed liberally. And, in consequence, trading as well as other establishments have been erected a considerable distance beyond the treaty port limits. In illustration we will cite the example of the Kuling estate in Kiukiang. We quote from a British consular report for that port for 1903:—

¹ See *supra*, 98.

² Cf. China, 1870, No. 9; 1871, No. 1, *passim*.

Kuling Estate. "The term 'immediate vicinity' has been, in one very notable instance at this port, extended in a manner to which it would perhaps be hard to find a parallel elsewhere in China. I refer to the Kuling estate and surrounding properties which have been acquired in the last six years on the Lushan mountains. Something like a square mile of the higher valleys has been leased to foreigners by the Chinese officials, after a variety of controversies.The chief property, the estate in the Ch'ang Ch'ung valley, leased to the Kuling Board of Trustees, has developed into a valuable and important sanatorium, with about 130 houses on it, and there are about ten or other houses on other neighbouring land owned by private individuals, British, American, and Russian. The Kuling trustees have been for over three years in negotiation for a large further extension of their holding. From 500 to 700 foreign visitors usually reside on these mountains during the whole or part of this summer, and there are a few permanent residents at all seasons.

"Apart from these health resorts, which are all on Crown or forest land at an elevation of 3,000 to 4,000 feet above the Yangtse, there is one property registered in the consulate as leased to a British subject in one of the lower valleys, and there are six other properties containing bungalows along the foot hills at from 700 to 1,100 feet elevation. Two of these belong to the customs, one to the Kuling trustees, who have the control of the road leading from it to their main estate on the mountains, one to an American missionary society, one to Russians, and one to a sort of limited company of shareholders, dating from 1867.

Six to Sixteen Miles. "Thus, in various ways, property for residential purposes has come into foreign hands at distances ranging from about six to sixteen miles from the port. There are, in addition, three properties at a less distance from Kiukiang, which are used as cemeteries. But the one or two attempts that have been made to acquire land for mining coal have been successfully resisted by the Chinese authorities, as involving breach of treaty. At the present time a piece of land has been rented on the north bank of the Yangtse, opposite Kiukiang, for a kerosene oil storage installation, but as yet the Chinese refuse to recognise the title by stamping the deeds, and the affair is blocked by the opposition of the governor of Kiangsi and the viceroy at Nanking."¹

§ 70 RULES OF PROCEDURE IN THE INTERIOR.

Similar to Treaty Ports. In regard to the acquisition of property in the interior the procedure resembles that in a foreign settlement. But as only the missionaries are entitled to such

¹ China, 1903, No. 1, 33.

a privilege, the lands are here conveyed to the missionary society, and not to the missionary himself.

**American
Treaty
1903.**

Article XIV of the American treaty of 1903, for example, provides as follows:—"Missionary societies of the United States shall be permitted to rent and to lease in perpetuity, as the property of such societies, buildings or lands, in all parts of the Empire for missionary purposes and, after the title-deeds have been found in order and duly stamped by the local authorities, to erect such suitable buildings as may be required for carrying on their good work."

**No Unrea-
sonable
Obstacles.**

No obstacles, however, are to be put in the way of such acquisition, unless the transfer be objected to by the local inhabitants. For example, in 1906, the magistrate of Siangtan (Hunan) refused to register a deed of land acquired by the American mission of the United Evangelical Church, unless all reference to the nationality of the mission was kept out of the deed. Such a move was regarded as creating an unreasonable obstacle.

**Case of
Magistrate
of Siang-
tan.**

The matter was referred to Washington, when the Department of State commented as follows:—"Inasmuch as the concluding paragraph of Article XIV of the treaty of October 8, 1903.....necessarily implies the establishment of the national and corporate character of these societies as a condition precedent to the stamping of their title deeds by the local authorities, the strange requirement of the magistrate at Siangtan, that the evidence of the treaty right of such a missionary society to acquire and hold property shall be excluded from the title deeds, becomes in fact a denial of the treaty right, and the substitution of an invalid for a valid act of registration."

The Wai-wu Pu was communicated with, and the magistrate finally replied as follows:—"As to the land purchased for a cemetery by Reverend Lingle and the United Evangelical Mission, the deeds for the property did not contain the words 'Chiao hui' (missionary society), and for that reason there was some delay. I have already consulted with the missionaries concerned, however, and the words 'Kung ch'an' (property of the society) have been inserted in the deed, which has now been duly stamped."¹

**No Unrea-
sonable
Demands.**

Moreover, there is to be no extortion or exaction on either side. Nor shall the missionary society insist on a particular location, if it can be shown that either their acquisition of the same will be reasonably resisted by the local population or that a fair exchange therefor can be made.

¹ For. Rel., 1906, 278-280.

**Case of
American
Missionar-
ies at Nan-
king.**

In 1893, for example, the American missionaries at Nanking desired to establish a summer resort among the hills adjacent to the city. On hearing that they had already constructed some huts therein, the viceroy of the province refused his assent. He claimed that outside of the city their lives would be in danger and, therefore, they would be beyond the reach of his protection. When the question was referred to Peking, he was sustained by his superiors, and in the Yamen's despatch to the United States minister, the following portion of his report was quoted with approval:—

“As China has authorised the building of churches and the propagation of Christianity *in the interior*, there would seem to be no reason in prohibiting to missionaries the simple privilege of resorting to certain places to escape the heat. The real reason, therefore, is to be found in the fact that the conditions are not the same within and without the provincial capital. The mountains to which the missionaries wish to resort are desolate and retired, and few people live there. Since the building of churches at Nanking to the present time, missionaries have never repaired to the mountains during the summer, and there is no provision in the treaties authorising them to do so. Throughout the Yangtse valley the popular mind is in an unsettled condition. Between the populace and the missionaries exists a great antipathy. Even within the cities where churches are protected by the magistrates, the suspicions of the people sometimes lead to trouble. If at some remote locality in the hills, the local officials would with difficulty learn of such troubles and would more than ever be unable to afford protection.”¹

**Rules of
1911.**

As a rule, considerable complications attend the acquisition of such missionary property. Such a state of affairs is inevitable under the circumstances. But there is room for improvement. Accordingly, with a view to the removal of these complications, the following rules were in April, 1911, agreed upon between China and the foreign representatives:—

(1) Property-owners shall be free to sell their property, and the missions desiring to buy lands shall not coerce them to sell.

(2) Before purchasing any property, the missions shall consult the local officials and request them to make an official survey of the ground as well as to ascertain the records.

(3) On the completion of the purchase, they shall apply to the local authorities for a tax-deed.

¹ For. Rel., 1894, 141. See also *ibid.*, 1874, 238; 1881, 287.

(4) The purchase shall always remain the property of the mission, and a tablet shall be erected to record such ownership.

(5) If, after purchase, the property should be resold to Chinese, they are prohibited from transferring it clandestinely to foreigners.

(6) The local authorities shall forbid the purchase of property in all cases where the property is purchased in the name of a mission, but not to be used for the purposes of the mission, or where it is to be used by foreign merchants for trading purposes.¹

§ 71. CONDITIONS IN SOUTH MANCHURIA.

So much for the rules of procedure governing the acquiring of lands in general. In South Manchuria, however, there is now a slightly different rule.

Prior to 1915, the regions in South Manchuria were treated on the same footing for the purposes of foreign trade and residence as those included under the category of the interior. Under the Japanese treaty of May 25th, 1915, the whole territory has become an open port. The treaty being concluded under a duress,² the privilege granted to the Japanese is exceptional.

Accordingly, Japanese subjects are permitted therein to "lease, by negotiation, land necessary for erecting suitable buildings for trade and manufacture or for prosecuting agricultural enterprises." This "lease by negotiation" is understood to imply a long-term lease of not more than thirty years, with the option of unconditional renewal.

Submission to Local Laws. This provision being applicable to the whole of South Manchuria, has a far-reaching effect. So in return for such a grant, the treaty provides that these landowners are to conform to the local police laws. In addition, they are also to submit themselves to Chinese jurisdiction for all taxation purposes.³

§ 72. *LEX LOCI REI SITAE.*

We will now discuss the nature of the law that is to be applied to the lands in China.

¹ Koo, 333-334. Previous to 1894, Chinese owners could not transfer their property until the local officials had given their consent. Under the agreement of Dec. 3, of that year, between Mr. Gérard, the French minister, and the Peking government, such owners need not first notify the officials. Cf. 128 Archives Diplomatiques (1898), 305; Koo, 318; 71 New Collection (General), 27.

² *Supra*, 17, footnote.

³ Art. 5, treaty (B), and note VII, appendix B, *infra*.

**Based on
Grantor's
Unsurren-
dered
Powers.**

When the territorial sovereign either reserves a piece of ground for international trade and residence, or waives his personal jurisdiction over the person or property of aliens dwelling within his dominions, he does not divest himself of his prerogatives appurtenant to the soil or lands comprehended in those grants. For he is still the sovereign owner of the soil, whatever the delegation may have been. He may have surrendered a part of his powers over his dominions, but he still retains those which he has not surrendered. Therefore, in the settlement of questions respecting the tenure of landed property, his law, or that which is based on his unsundered powers, must apply.

**Japanese
Treaty,
1915.**

In legal parlance this is known as the law of the place where the property is situated, or *lex loci rei sitae*. Accordingly, Article V of the second Japanese treaty, 1915, provides that "mixed civil cases between Chinese and Japanese relating to land shall be tried and adjudicated by delegates of both nations conjointly, in accordance with Chinese law and local usage."¹

**Incompati-
bility of
Foreign
Realty
Doctrines.**

Land tenure in China, as in other countries, is subject to all the rights and liabilities incidental to such holding. Therefore, it cannot be pretended that for such purposes the national laws of the alien concerned are to prevail. The English doctrines of realty or law of trusts,² for example, can have no application whatever to the lands in question. In fact, were the English law to apply, it would amount to a trust created for the purpose of evading a rule of law. As such it would be held illegal and void even under Anglo-Saxon jurisprudence.³

**True Nature
of Extra-
territorial
Rights.**

In the language of the Judicial Committee of the Privy Council, in the Zanzibar case,⁴ the rights of extraterritoriality as conferred by the territorial sovereign, show the nature of the immunities desired by, and

¹ *Infra*, appendix B.

² See Alabaster, 587-600, for the Chinese law governing religious and private trusts as well as the judicial decisions thereon. Some of the rules are as follows:— (a) The object of a trust having been accomplished, the trust will still be maintained; (b) a *bona fide* purchaser of trust property for valuable consideration, and without notice, will not be disturbed, provided that those interested have had ample opportunity to oppose the transfer if they saw fit to do so; (c) a *bona fide* purchaser of trust property for valuable consideration will not be disturbed, save on the clearest evidence; (d) a property devised with a condition of maintaining the ancestral "worship" cannot be alienated; (e) the erection of a temple giving a right of patronage to the founder and his heirs, gives a right of advowson indefeasible by subsequent benefactors, although these will be allowed to recall their benefactions if the consequent privileges of patronage be denied them.

³ Louis N. Richards, in 15 Harvard Law Review (1901), 195.

⁴ *The Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*, 1901 A. C. 373-396.

accorded to, the subject of the treaty powers—namely, complete personal protection, assurance of satisfactory judicial tribunals, and such enjoyment of his property for himself and for those who claim under him, as his national law will afford him. But “it is going a long way beyond that, and beyond the reason for these immunities, to say that the moment a plot of land is purchased by an Englishman, it is stamped by the same character and is attended by the same incidents that would belong to it, if it were actually conferred to England and surrounded by other English land; and to say that his neighbours, who may or may not be British subjects, must have their rights and liabilities governed by its fictitious, and not by its actual situation.”¹

Judicial

In *Macdonald v. Anderson*,² decided in 1904 at Tientsin, before Mr. Justice Bourne, of the British Supreme Court for China, the above reasoning was followed. Said Sir Frederick:—“I hold that the law of China ought to be applied to the facts of this case. The Court administers the law of England (1865 Order-in-Council, art. 5); but what is the law of England in regard to immovable property situated within the dominions of the Emperor of China? Undoubtedly, that right in respect of such property shall be governed by the *lex situs*, that is, by the law of China.....The law applicable to lands in China owned by His Majesty’s subjects has been so long a moot point, and the interests involved are so large, that I think I ought, now that the question has been raised by this suit, to state my opinion of the effect of the judgment of the Privy Council in the above case—*Secretary of State v. Charlesworth Pilling & Co.* That case seems by analogy to establish two propositions: that Chinese law ought to be applied by his Majesty’s courts in China to the incidents of land in China, and that his Majesty’s judges in China ought to take judicial notice of Chinese law.”

Moreover, according to the British law officers, this *lex loci* must similarly govern the law relating to contracts between British subjects in China and Chinese respecting the cession of property in China.³ And the opinion has also been expressed that “it is not unlikely that under the American foreign jurisdiction the same principle (*lex loci*) would be followed.”⁴

¹ *Ibid.*, 384.

² North China Herald, Feb. 5, 1903, 247-350; Hinckley, 250-253.

³ Norton-Kyshe, I., 377.

⁴ Hinckley, 97.

CHAPTER VII

RIGHT OF RAILROAD CONSTRUCTION.

§ 73. DEFINITION.

In the course of our discussion we meet here, for the first time, with a special group of treaties of a hybrid character. As a rule, an agreement to build or finance a railroad is a commercial contract, pure and simple; in China, however, a political element is imported into the commercial transaction.

“Battle of Concessions.” These agreements were principally made during or immediately after the period of the scramble for leased territories.¹ When the struggle was at its height, Lord Salisbury, the British Foreign Secretary, telegraphed to Sir Claude MacDonald, the British minister at Peking, on July 13, 1898, as follows:—“It does not seem that the battle of concessions is going well for us.....One evil of this is, that no orders for materials will come to this country. That we cannot help. The other evil is, that by differential rates and privileges the managers of the railways may strangle our trade. This we ought to be able to prevent, by pressing that proper provisions for equal treatment be inserted in every concession.”²

Politico-Commercial Transaction. Against the Chinese government the private concessionaire has the active or watching support of his minister at Peking or of his own government at home. For the terms of the contract are examined by his diplomatic representative before the completion of the transaction, or they are communicated to him on its signature. Or as a British minister himself put it:—“I repeat what I said to you when here; not a single *bona fide* or approximately practical scheme which has been brought to this legation has failed to be put through.”³

Now such a situation is without legal justification, and the agreements⁴ can hardly be considered as advantageous to the grantor.

¹ *Supra*, 66, 71.

² China, 1899, No. 1, 164.

³ Sir Claude Macdonald to Lord Charles Beresford, Nov. 23, 1898, in China, 1899, No. 1, 344.

⁴ See Rockhill, 207-417; Kent, 203-298.

§ 74. TERMS OF CONTRACT.

There are two classes of concessionaires: (a) Foreign governments; (b) Foreign individuals or companies. In the first the concession is granted to a government for a specified period of time, within which the latter may construct the railroad as well as administer it. In the second the grant is conceded to a foreign individual or company, the terms of which will be discussed in connexion with railway loans.¹ On the expiration of the lease the line or lines will revert to the grantor, with or without the payment of compensation to the grantee, and with or without the right of redemption before the expiry of the term.

Strategic Railways. As regards the concessions of foreign governments, these were acquired by them for strategic purposes. For example, the Chinese Eastern Railway or Russian extension of the Trans-Siberian line, estimated at 1,000 miles, was secured in 1896 and prolonged southwards, in 1898, to Port Arthur for another 400 miles. After the Russo-Japanese war, the 400-mile extension to Port Arthur was transferred to Japan in 1905. This transfer was confirmed by China, and Japan secured in addition the construction of the Antung-Mukden line of 170 miles. In 1898, the French secured an extension of their Tongking line into Yunnanfu—a distance of some 200 miles. And, in the same year, the British obtained an extension of their Burmah system to the Yangtse river—a distance of 700 miles.

Right of Redemption. Concerning the right of redemption, the Russian line will lapse 80 years from date of opening; but 36 years after the completion of the whole line, China may reacquire the property by paying compensation in full.² The Antung-Mukden concession is for 15 years, but no right of redemption before the expiry of the term is reserved.³ The French railway to Yunnanfu is for 80 years, but at the end of 18 years the Chinese government may redeem it by paying compensation in full. If the option is not exercised, it will revert without compensation, as in the case of the Russian line, at the end of 80 years.⁴

§ 75. "SPHERES OF INTEREST."

As in the case of the so-called "spheres of influence," it is usual to claim that if an alien corporation is granted the privilege of rail-

¹ *Infra*, § 81.

² Russia, 1898, No. 1, 8-9. For a modification of this 36-year period of the South Manchurian section of this line, see *infra*, appendix B, treaty (B), note (1).

³ Under the Japanese treaties of 1915 (*infra*, appendix B, treaty (B), art. 1), the original period has been prolonged to 99 years.

⁴ Hsu, 60.

road construction, the area of territory traversed by the railway constitutes a "sphere of interest" for its own government. Accordingly, the concessionaire's government is said to have the sole right of developing the industries or economic interests of that region.

Claims In- Now such a claim is as untenable as that put
admissible. forward in the so-called "spheres of influence." Except where an engagement to this effect has been expressly entered into by the grantor, as in the Kiaochow agreement,¹ the above assumption lacks foundation. It is conceivable that self-interest may prompt the governments of the different concessionaires to arrange among themselves regarding the respect due to each other's "spheres."² But those understandings can only bind the states who are parties thereto. They can never bind the grantor. The fictions of "spheres of influence" and "spheres of interest" were created contemporaneously, designed to stand or fall together. What we have already said about the first³ applies, *mutatis mutandis*, to the second. And so no further discussion is necessary.

§ 76. RIGHT OF OPERATION INDEPENDENT OF TREATIES.

Apart from the exceptional right conferred by the agreements above noted, an alien or alien company may apply for special permission from the territorial government to build and operate railways in China. Under the Railway Regulations of 1904, he is permitted to apply for such authorisation, subject to the condition that the foreign interests in a railway company organised thereunder shall not exceed fifty per cent. of its total capital.⁴

This method, however, is to the alien concessionaire too prosaic to prove attractive. It lacks the romance of negotiating with the territorial government with the support or knowledge of his own minister at Peking—an invaluable asset to the concession-hunters. Accordingly, this independent method of procedure does not appear to be availed of to any extent.

¹ *Supra*, 93.

² See China, 1899, No. 2: Correspondence between Great Britain and Russia with regard to their respective railway interests in China.

³ *Supra*, 88-92.

⁴ 17 Kuanghsu's New Laws and Ordinances, 8; Koo, 282.

CHAPTER VIII

RIGHT OF MINING EXPLOITATION

§ 77. DEFINITION.

The privilege to open mines in China is of two kinds. In the first, the grant is conferred in conjunction with that of railroad construction. And for this purpose it is provided that the concessionaire may develop and operate all mines on either side of the railway track within a distance of from five¹ to thirty *li*.² In the second case the privilege is granted primarily for mining purposes. Sometimes, however, it may carry with it the collateral right of constructing a short railway or railways to connect the mines or transport their machinery and output.³

§ 78. TERMS OF CONTRACT.

Royalties. If the concession be granted as a collateral right to that of railroad construction, the proceeds of the mines are appropriated by the operating government or corporation for the benefit of the line. If, however, it is a pure mining grant, a percentage of one-fourth of the net profits is reserved as royalties to the territorial government. And if the concessionaire is an alien government, the usual production tax and royalties are likewise reserved to the grantor.⁴

Production Tax. In addition, a production tax of 5% is levied at the pit. "In future, whenever capital is used to work coal or iron mines in China, this rule for a 5% government tax on the output shall be enforced, so that all may be treated alike." From the annual proceeds, 6% is to be employed to pay back the capital advanced by the concessionaire, and 10% set aside as a sinking fund for the yearly repayment of capital and consequent reduction of

¹ Art. 5, Peking-Newchwang railway, 1898.

² Art. 4, sec. II, Kiaochow convention. "Chinese capital may be invested in these (railway and mining) operations, and arrangements for carrying on the work shall hereafter be made by a joint conference of Chinese and German representatives."—*Ibid*.

³ Art. 17, Peking Syndicate's Honan concessions, June 21, 1898; art. 13, Nan-p'iao mines, Oct. 10, 1898.

⁴ Art. 3, Japanese 1909. See also *supra*, 16, footnote (6).

interest. But, "this capital being money lent by merchants for mining purposes, the Chinese government will not in any way be responsible for losses incurred in the business."¹

Control. The control of the mines is vested in the concessionaire syndicate during the life of the grant.² On the expiration of the lease all mines, together with their property and appurtenances, will be handed back to the grantor, *gratis* and without any compensation whatsoever.³ Each mine will have one foreign and one Chinese manager, "the foreigner to control the works, the Chinese to attend to all matters between natives and foreigners." Accounts will be kept in the foreign system; "receipts and payments of money will be controlled by the foreign manager, but these are to be audited by the Chinese manager."⁴

Redemption. Concerning the right of redemption, it is provided that "if any Chinese gentry or merchants shall, within the term (of sixty years).....acquire three-fourths of all the shares of any one mine, that mine may then be redeemed from the concessionaire syndicate."⁵ But, meanwhile, the concessionaire is to utilize as much as possible native talent as well as local labour, and also establish a mining school for that region.

China at War. Finally, there is this important provision regarding China being at war:—"These mines being under the sovereignty of China, should China ever be at war with another country, the syndicate will obey the orders of the Chinese government prohibiting any aid to the enemy."⁶

§ 79. MINING REGULATIONS.

Independent of the above "treaty" right, an alien is also authorised, as in the case of railways, to obtain a special permit to open mines in China or hold stocks in Chinese mining companies.

According to Article IX of the Mackay treaty, 1902, China engages to amend the existing mining regulations and, selecting from the rules of Great Britain or other countries, which seem applicable to conditions in China, recast them "in such a way as, while promoting the interests of Chinese subjects and not injuring in any way the sovereign rights of China, shall offer no impediment to the attraction of foreign capital or place foreign capitalists at a

¹ Art. 6, Peking Syndicate's Shansi mines, May 21, 1898.

² Arts. 3 and 9, *ibid.*

³ Art. 9.

⁴ Art. 4.

⁵ Art. 15.

⁶ Art. 19.

greater disadvantage than they would be under generally accepted foreign regulations.”¹ Accordingly, the Regulations of 1907² were drawn up. And since no new ones have as yet been promulgated, we will cite from the above regulations.

Submission to Chinese Jurisdiction. An alien may not purchase or otherwise take an absolute title to any mining lands. Further he must observe Chinese laws. As regards jurisdiction, it is provided as follows:—“The subjects of treaty powers who voluntarily co-operate with Chinese subjects in mining enterprises shall be held to have thereby consented to observe Chinese laws, to submit themselves to the control of Chinese authorities, and to act in conformity with the Mining Regulations now in force, or to be made in future, and other kindred laws, such as the Law of Companies. They may be permitted to carry on the necessary operations only if they really observe the foregoing requirements.”³

Persons under Disability. The following are, however, not admitted to such a privilege:—(1) Buddhists, Taoists, and members of missionary associations who pursue religion as a profession. (2) Subjects of non-treaty states as well as of states which do not reciprocally accord the like privileges to Chinese subjects. (3) Foreigners who do not observe the laws of China and those who have once been guilty of offences against the Chinese law, or the law of their own country. (4) Foreigners who are in the service of foreign governments or of the Chinese government. (5) Those who have held offices under a foreign government and have not definitely resigned them. (6) And those who may be denied the privilege by special order of the Chinese government.⁴

A Bond Deposit. In submitting his application for such a permit, the alien is required to produce a testimonial from his consul, certifying that the applicant is ready and will observe the regulations and supplementary rules made or to be made thereunder. At the same time he is to deposit a bond as a pledge that he will constantly observe the same.

Privileges of a Mining Merchant. Such a permit, when granted, confers upon him the status of a “mining merchant.” It entitles him to the special protection of the local authorities, and exempts him, and him alone, from the treaty provision requiring him to take out a passport for travelling in the interior. The same permit also exempts him from the prohibitions regarding holding lands,

¹ Cf. Art. 7, American 1903.

² 16 Kuanghsu's New Laws and Ordinances, 92 *sqq.*; K'oo, 282-285.

³ Art. 49, 1907 Regulations.

⁴ Art. 10, *ibid.*

renting houses, and establishing trading companies or warehouses or other similar acts in the interior. Concerning all other foreigners, however, including those desirous of going inland for prospecting or working in mines, the treaty provisions "remain in full force and without the slightest modification."¹

Crimes and Offences. If a mining merchant commits a crime, the treaty stipulations will be followed, subject to the proviso that, if the judgment of the consul does not meet with the tacit approval of the Chinese authorities, or satisfy the other mining merchants in the region where the offence was committed, then the offender's fellow-nationals may not again apply for authorisation to open mines in that province.² In civil suits, however, as where he is engaged in a monetary litigation with a Chinese or another foreigner, affecting merely the private rights of the parties concerned, "the Chinese authorities shall decide in accordance with the Chinese law and established rules." If, however, the circumstances of the case be peculiar and unprovided for in either the laws or the rules in force, then it shall be settled impartially, "according to the laws prevailing in foreign states generally and with due consideration of the state of Chinese law."³

Appeals. A system of appeals is also instituted, under which a mining merchant may appeal from the district mining deputy's decision respecting mining affairs to the general mining bureau of the province, or carry his appeal finally to the Ministry of Agriculture and Commerce at Peking. In such appeals "no minister or consul of any nation may intervene." The case will be decided according to the regulations, unless where it is not expressly provided for. In the latter case, "the mining laws of foreign states may be cited as the basis of a decision," but such citation "must not be contrary to the principles of the regulations."⁴

¹ Arts. 59 and 63.

² Art. 61.

³ Art. 60.

⁴ Art. 62.

CHAPTER IX

LOANS

§ 80. DEFINITION.

The agreements respecting the making of loans to China constitute the second species of treaties and conventions which dwell within inverted commas. As in railway contracts the transaction is likewise of a politico-commercial character. These fall under two categories: (a) agreement for a railway loan, and (b) agreement for a public loan. In the first, the loan is advanced by the creditor in consideration of the grant to construct a line; in the second, the loan is advanced for the prosecution of reforms which the Chinese government contemplates instituting.

§ 81. RAILWAY LOANS—TERMS OF CONTRACT.

Prior to 1908, the terms of a railway contract were almost usurious. For example, according to the **"Peking Shanhai-kuan" Terms**, agreement of the Peking-Shanhaikuan railway, a British concession granted in 1898, the chief engineer and accountant were to be appointed by the creditor. In default of payment the line itself was to be handed over to the creditor, and no further loan was to be raised on the same security except with the creditor's consent.

As these terms constituted a "foreign control of the line," Russia protested in the interests of its own concession, the Port Arthur extension of the Chinese Eastern railway. Eventually, the governments of London and St. Petersburg exchanged notes on the subject, as follows:—"The general arrangement established by the notes referred to above is not to infringe in any way the rights acquired under the said (Peking-Shanhaikuan) loan contract, and the Chinese government may appoint both an English engineer and a European accountant to supervise the construction of the line in question and the expenditure of the money appropriated to it. But it remains understood that this fact cannot be taken as constituting a right of property or foreign control, and that the line in question is to remain a Chinese line under control of the Chinese government, and cannot be mortgaged or alienated to a non-Chinese company."¹

¹ China, 1899, No. 2, 85; Reinsch, 114-120.

“Tientsin-Pukow” Terms. Since 1908, however, the terms have been more favourable to China. The right of control and administration of the railroad is reserved in the borrower. According to the agreement of that year with the Hongkong and Shanghai Bank and the German Bank for the financing and construction of the Tientsin-Pukow line, it is the borrower who appoints the chief engineer, although the creditor may or may not approve of his selection. The borrower controls the funds and receipts, although the creditor may inspect the accounts and verify the payments. In the event of default of payment, the revenue pledged for its service will only be transferred to be administered by the maritime customs.¹

Security. In some cases the loan is secured by a specific and first mortgage upon all lands, materials, rolling-stock, buildings, property and premises of every description, purchased or to be purchased for the railway, and on the railway itself, when constructed, as well as on the revenues of all description derived therefrom.²

Redemption. The right of redemption is generally exercisable after so many years, subject to the payment of adequate compensation. But in a few cases the option is so restricted as to operate in the nature of a clog on redemption.

“Percentage Contract Construction System.” In the concession of July 25, 1914, to Messrs. Pauling & Co., Ltd., a British syndicate, to construct and finance the Shasi-Shingyifu line, the “percentage contract construction system” was first adopted. Some of the terms are as follows:—(1) The railway is to be constructed by the contract system. (2) The Chinese managing director is to co-operate with a firm of British consulting engineers in drawing up plans and supervising the work. (3) A firm of British accountants is to be engaged to keep the accounts of the loan, which is secured on the railway and the properties connected therewith, and is also guaranteed by the government. (4) Specifications and costs must first be approved by the Chinese authorities.³

§ 82. PUBLIC LOANS—TERMS OF CONTRACT.

In general the creditor is given the option of first accepting or refusing an offer to lend a subsequent loan to be floated for the same objects or secured on the same assets.⁴ In most cases the borrower is

¹ Hsu, 135-140. These are known as the “Tientsin-Pukow” terms in contradistinction with those of the Peking-Shanhaikuan line.

² See the Sinyang-Pukow railway, a concession granted to a British syndicate on Nov. 14, 1913, in Hsu, 158.

³ Hsu, 161.

⁴ See *supra*, 92-93.

entitled to pay off the loan with compensation so many years before the expiration of the term.¹ But in others, a clog on redemption is inserted, which binds the borrower to allow the loan to run out its appointed time.²

§ 83. PUBLIC LOANS—SECURITY.

In some of the earlier loans the receipts of the maritime customs constituted the first security.³ In subsequent advances, however, other proceeds or taxes have been drawn upon—*e.g.*, the *li-kin* tax,⁴ the octroi and other taxes,⁵ as well as the salt tax.⁶

Default of Payment. If other receipts than those of the maritime customs be hypothecated, it is usually provided that in default of payment such secured revenues shall be transferred to and be administered by the maritime customs.⁷ The Austrian loan of 1912 is, however, an exception. Article IX of the loan agreement provides that in default of payment, the Austrian minister shall have the right to nominate a third party to administer the secured revenue until the loan is repaid.

Question of Priorities. Among the different loans themselves the question of priorities is to be observed, so that the creditor of the second loan shall not be preferred to that of the first, in case the same security is pledged to both advances: *Qui prior est tempore, potior est jure*. But to prevent any disputes arising in future, a priority clause is generally inserted in the agreements. Thus Article IV of the Reorganisation Loan of 1913, reads as follows:—Subject to previous charges, “no loan, charge or mortgage shall be raised or created which shall take precedence of or be on an equality with this loan, or which shall in any manner lessen or impair its security over the said revenue of the salt administration of China, so far as required for the annual service of this loan, and any future loan, charge or mortgage charged on the said revenues of the salt administration shall be made subject to this loan, and it shall be so expressed in every agreement for any such future loan, charge or mortgage.”

¹ Art. 13, Currency Reform, 1911; art. 10, Crisp 1912; art. 9, Reorganisation, 1913.

² Art. 3, Anglo-German 1898.

³ Art. 15, British 1894; art. 7, Anglo-German 1896.

⁴ Art. 6, Anglo-German 1898; art. 5, Currency 1911.

⁵ Art. 5, Currency 1911; art. 9, Austrian 1912; art. 3, Belgian 1912.

⁶ Art. 4, Crisp 1912; art. 4, Reorganisation 1913.

⁷ Art. 4, Crisp 1912; art. 5, Reorganisation 1913.

PART III

TREATIES, CONVENTIONS, ETC., OF A GENERAL CHARACTER

CHAPTER I

RIGHT OF PROTECTION

§ 84. DEFINITION.

So far we have dealt with treaties, conventions, agreements, etc., of a political and economic or commercial character. Those dealing with matters of a general character—*e.g.* respecting the right of protection, religious toleration, rights of reciprocity, treaty interpretation, and the most-favoured-nation clause—remain to be considered.

We will first take the right of protection. In all treaties it is provided that the subjects or citizens of the contracting parties shall each within the dominions or territories of the other enjoy full protection in person and property. They shall not be subjected to any molestation or interference in the pursuit of their lawful callings or occupations, and as long as they are law-abiding they shall receive every protection from the territorial government in all that appertain to the enjoyment of their rights and property.

§ 85. EXTENT OF PRIVILEGE.

Armed

In China the alien's right to protection is defined **Assistance.** to mean that the local authorities shall defend him from all insults and injuries. And if his dwellings or property be threatened or attacked by mobs, incendiaries or other violent or lawless persons, the local authorities, on the requisition of his consul, shall immediately dispatch a military force to disperse the rioters, apprehend the guilty individuals, and punish them with the utmost rigour of the law.¹

Embargo.

This right is further extended to imply that no embargo shall be placed by the territorial authorities on

¹ Art. 11, American 1858; art. 18, British 1858.

his vessels and property. "Nor shall they be seized or forcibly detained for any pretence of the public service: but they shall be suffered to prosecute their commerce in quiet, and without molestation or embarrassment." ¹

Jus Angariae. Now the above, of course, holds good only in time of peace. For in the event of hostilities, alien subjects are not entitled to a more favourable position than the subjects of the territorial sovereign. In which case he cannot be denied his *jus angariae*, so long as he makes suitable amends. Article X of the Mexican treaty of 1899, accordingly, provides as follows:—"The vessels, cargoes, merchandise or effects of citizens or subjects of neither contracting party shall be detained for any military expeditions, or for any public purpose whatever, without corresponding compensation first being agreed upon and settled."

War Contributions. But even in time of war between the territorial government and a third state, the right shall exempt the subjects or citizens of the treaty states "from all compulsory military service whatever, whether in the army, navy, or national guard or militia." Moreover, "they shall likewise be exempt from all contributions, whether pecuniary or in kind, imposed as a compensation for personal service, and, finally, from forced loans and from charges, requisitions, and war contributions, unless imposed on real property when they shall pay them equally with nationals." ²

§ 86. LIMITATIONS OF PRIVILEGE.

Forfeiture of Right. An alien is entitled to the fullest protection, unless he expressly or impliedly forfeits his right. So long as he conforms to the laws of the territorial government, as established by the treaties, the latter is bound to afford him every assurance of security. If, however, he disregards all warnings and exposes himself to unnecessary risks, *e.g.*, as in a riot or insurrection, the local authorities cannot be responsible for any injuries which he may incur by his own imprudence or recklessness. For, having taken the law into his own hands, he is debarred from seeking their protection.

Force Majeure. Moreover, if the injuries result from circumstances which could not have been foreseen by either the alien himself or the territorial government, the latter's responsibility is necessarily restricted to one of adopting prompt measures to suppress the violence and apprehending the law-breakers for due punishment.

¹ Art. 28, American 1844; art. 12, French 1858.

² Art. 10, Mexican 1899. See also *supra*, 101.

And if the territorial sovereign's power to put down the disorder is overborne by superior force or *force majeure*, then his responsibility is correspondingly decreased.

Territorial Sovereign's Self-Defence. Now so long as the situation remains normal, the foreigner's property will be fully respected and protected. But in exceptional cases, as in the event of hostilities or the better promotion of hygiene and sanitation, the

territorial sovereign has the right to exercise his prerogative and adopt whatever measures he may deem adequate or necessary for his own self-defence. In other words, "no prohibition or restriction of importation or exportation shall take place in the reciprocal commerce of both countries, unless it be likewise applied to all other nations, except for sanitary motives.....or also in view of events of war."¹

§ 87. QUESTION OF LIABILITY AND FOREIGN CLAIMS FOR COMPENSATION.

International Practice in the West. In international theory and practice it is generally admitted that, in the case of injuries to the person or property of aliens residing within his dominions, the liability of the territorial sovereign is predicated only where he could have foreseen as well as prevented the awkward consequences. If the actual violence could not have been either foreseen or avoided by any exercise of vigilance on his part or that of his officers, the territorial sovereign is absolved from blame: *Nemo tenetur ad impossibile*. To hold him to strict accountability in all cases, is to say he must do the impossible as well as place alien subjects on a more favourable footing than that accorded to his own subjects.²

International Practice in China. In China, however, the above equitable doctrines have generally been disregarded by the foreign governments, and until recently the territorial government has always been held to an absolute responsibility. "China, indeed, regardless of treaties, has in innumerable cases been held to a degree of responsibility amounting to a guaranty of the security of persons and property of aliens.....In other words, liability is predicated on the *failure* to prevent the injury, regardless of the *ability* to prevent it. This practice overlooks the principle that an alien visiting unstable countries assumes a certain measure of risk, and compels the weaker nations, like China and Morocco, to assume a certain degree of guaranty for the safety of aliens."³

¹ Art. 8, Mexican 1899.

² Cf. Moore, VII., § 1023; 1 Am. J. Int. Law (1907), 26-45; *ibid.*, 1913, 497-520; 724-766; 1914, 802-852.

³ Borchard, 222, 215.

**China's
Burden.**

Now, the burden imposed upon China is most irksome. Were aliens not entitled to the rights of extraterritoriality wherever they reside or travel in China, the territorial sovereign would have complete jurisdiction over their person and property. If so, he could be held responsible for their fullest protection. As we have seen, however, even this much is not admitted or conceded by Western governments in their relations with one another.¹ But add the embarrassments of extraterritoriality and the consequent diminution of jurisdiction and control over foreigners to the shoulders of China, and the injustice of holding her to absolute responsibility becomes at once apparent. Moreover, the fact that foreign warships may be stationed at the open ports in order to protect the commerce of their nationals, appears to diminish *pro tanto* the responsibility of the territorial sovereign for affording the fullest protection to such alien subjects and their property.

**Rule before
1900.**

Prior to 1900, China had to pay all and sundry claims preferred by the aliens or their governments. But in the light of the practice in Western countries, a vast majority of the claims then made and paid would not be entitled to any payment in either law or equity. For example, in 1898, for the murder of two German missionaries in Ts'aochowfu (Shantung) by brigands, Germany demanded the lease of Kiaochow Bay and the right of railroad construction in Shantung province. And, in the same year, when a French priest was also murdered in Szechuen, France demanded an indemnity of Tls. 1,200,000 as well as mining rights in six districts, extending over six degrees of longitude, in the heart of Szechuen province.² China was weak in terms of military strength, and so was in no position to demur. Hers was not to question the reason why; hers was but to do and pay.

**American
Claims,
1858.**

The American claims of 1858 may be cited as another illustration. During the hostilities between England and France and China in 1856-1858,³ losses were incurred by Americans in the theatre of war. A claim having been made for their indemnification, China agreed by treaty to pay Tls. 500,000 which, together with the interest accruing therefrom, amounted to G. \$735,258.97. Two commissioners were appointed by the United States, in 1859, to adjudicate upon the claims of its nationals. Of the claims presented \$321,355.99 was disallowed and \$114,187.95 allowed.⁴

¹ Cf. Moore, VI., §§ 1032-1049, and the rules adopted by the Institute of International Law, in 1900, in 18 *Annuaire*, 254-256.

² Reinsch, 146; R. S. Gundry, in the *Fortnightly Review*, 1899, 461.

³ See *supra*, 7.

⁴ 40th Cong. 3rd sess. Exec. Doc. No 29 (1868-1869), pt. 8, 160-161.

The Caldera. In the case of the *Caldera*, a Chilean bark of 574 tons, which on Oct. 7, 1854, put into a bay near Hongkong through stress of weather, and was there plundered by piratical bands, the two commissioners disagreed. The decision of Commissioner Roberts was, however, upheld by the American government, although the claim of the vessel's New York underwriters had been rejected by two successive ministers.

Dissenting Judgment. The dissenting commissioner, Dr. Bradley, expressed himself as follows:—"A decision in favour of the claimants would be unprecedented, as numerous like instances have, within the last 17 years, occurred in waters over which China exercises jurisdiction for which neither British nor American underwriters have ever asked indemnity.....Piracy is one of the risks against which they insure; and it would be as reasonable to insist on Chinese indemnity for losses by Chinese typhoons as for those by Chinese pirates.

McLeod Case cited. "*Mutatis mutandis*, Mr. Webster's line of argument with Mr. Fox, the British minister at Washington,¹ is equally pertinent to the Chinese, as regards piracy. He pleads, on account of 'the extent of the frontier' to be guarded, 'that irregularities, violences, and conflicts should sometimes occur, equally against the will of both governments, is certainly easily to be supposed. This may be more possible perhaps, in regard to the United States, without any reproach to their government, since their institutions entirely discourage the keeping up of large standing armies in time of peace, and their situation happily exempts them from the necessity of maintaining such expensive and dangerous establishments. All that can be expected from either government in these cases is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and that if offences cannot, nevertheless, be always prevented, the offender shall still be justly punished. In all these respects the government acknowledges no delinquency in the performance of its duties.'

"With the same justice and propriety," concluded the commissioner, "might the imperial prime minister adopt this language in reference to the cause of the pending suit."²

The Neva. In the end, the claimants received some \$170,000. But in the almost similar case of the *Neva*, which was scuttled by Chinese pirates in November, 1857, the claim of its owners was rejected by the two commissioners. Subsequently, in

¹ This refers to the McLeod case, or that of the *Caroline* (*supra*, 77) in connexion with the Canadian border difficulties.

² 40th Cong., etc., 175-176.

1869, a sum of over \$38,000 was also paid them from the surplus funds. Moreover, one claim for false imprisonment and corporal punishment, in 1841, was reduced from \$50,000 to one-fifth which, with eighteen years' interest at 12%, totalled \$31,600. But finally, in 1885, \$453,400 was returned to China.¹

In 1900, however, a new rule was inaugurated. **1900 Rules:** During the negotiations between the powers and China over the settlement of the "Boxer" troubles, the foreign representatives appointed a commission on indemnities, consisting of the ministers of Belgium, Germany, Holland and the United States. In assessing the claims to be presented to the Chinese government, the object in view was expressed to be "first, to ensure an equitable indemnity to those who have been injured, and second, to prevent the anti-foreign movement of 1900 being made use of under circumstances as a pretext for illegal gain or profit."² Accordingly, in abrogation of the former doubtful practices of computing on indirect as well as illegal claims, the commission laid down the following principle:—"Damages shall not be claimed except in cases which are immediate and direct consequences of the anti-foreign movement."

Inadmissible Claims. Therefore, the undermentioned "ought not to be considered as an immediate and direct consequence of the events of 1900":—

(A) To merchants:

(a) Losses of earnings resulting from the interruption of business or from the disturbed state of commerce at Peking, Tientsin, and elsewhere; (b) bills payable at deferred sight of a risky character; (c) goods belonging to Chinese, intended for export on their way from the interior with transit passes; (d) telegrams, insurance charges, and other ordinary expenses of this nature; (e) interest on goods in stock; (f) loss of interest on exchange contracts with banks; (g) goods in transit belonging to Chinese; (h) increased freight charges, except in the case of contracts entered into before the events; (i) commission to be earned on future contracts; (j) depreciation of value on millinery and similar articles; (k) fluctuations of exchange; (l) ordinary insurances of goods sold but not delivered; (m) losses caused by the interruption of banking operations during the troubles; (n) remuneration to employees to compensate them for the sufferings

¹ For. Rel., 1886, 147.

² For. Rel., 1901, Appendix, Affairs in China, 104-108; China, 1902, No. 1, 46-49.

undergone; (o) hotel guests who have failed to pay their bills; (p) loss of customers generally; (q) value of sites, the buildings on which have been destroyed; (r) depreciation of land in consequence of events; (s) negotiable instruments not met, unless the real damage done can be clearly established; (t) interest on loans; (u) money lent to Chinese, except in transactions when the security given was amply sufficient.

(B) To private individuals:

(a) Mental sufferings and injuries of any character; (b) illness, except in cases where it entails incapacity for work; (c) travelling expenses other than journeys to the nearest place of safety; (d) destruction of Chinese houses rented to foreigners; (e) loss of diplomas; (f) loss of customers.

(C) To Chinese:

(a) Chinese capital invested in commercial or industrial undertakings in association with foreign capital; (b) to compradore's goods, being his personal property, which were lost in a godown belonging to a foreigner.

Admissible Claims. As regards the claims which were declared as admissible, the list is as follows:—

(A) To societies and companies:

(a) Buildings and other property which have been destroyed or damaged, belonging to societies and companies in Peking, Tientsin, or elsewhere, including temporary housing and repairs, expert surveys for determining the amount of damages, etc.

(B) To industrial undertakings:

Direct losses suffered by industrial undertakings, works commenced, wasted or suspended.

(C) To merchants:

(a) Private property of merchants; (b) real estate destroyed or damaged, including temporary housing and repairs, expert surveys for determining the amount of damages, etc.; (c) furniture; (d) usual and inevitable salary of employees whose services could not be turned to account; (e) unavoidable office expenses not made good in consequence of the events; (f) stock-in-trade, goods, provisions, samples possessing pecuniary value, destroyed or deteriorated; (g) extraordinary cost of storage and reshipment; (h) debts recognised as valid which can no longer be recovered; (i) bank-notes lost or which cannot be cashed; (j) specie, bills payable

at sight; (k) broken contracts of all descriptions, losses suffered in consequence of the non-execution of contracts entered into for articles of exportation or importation; (l) deposits of money in telegraph-offices or in banks, and advances to Chinese merchants who have become insolvent in consequence of the events; (m) extraordinary cost of insurance rendered necessary by the events referred to; (n) goods requisitioned for foreign troops for defensive works.

(D) To private individuals :

(a) Real estate destroyed or damaged; (b) broken contracts of every description, losses through non-execution of contracts; (c) articles destroyed or disappeared in consequence of the troubles; (d) furniture, personal effects, jewellery, specie, bank-notes which cannot be cashed, *objets d'art*, pictures, photographs and family portraits only if of artistic value, knick-knacks, books, collections, memoirs, and letters, and documents (calculated according to their saleable value), manuscripts and materials collected for the publication of books (conditionally on the real value being proved), plans and instruments, provisions, wines, animals, and various materials; (e) articles destroyed or lost in pawnshops, deduction being made on advances received on such articles; (f) rents not recoverable or rents paid in advance, where occupation was prevented in consequence of the events; (g) deposits of money in telegraph-offices or in banks; (h) journeys to the nearest place of safety; (i) wounds or cruel treatment entailing the death of the bread-winner, incapacity for work, or direct loss of money.

(E) To Chinese in the service of foreigners :

(a) Indemnities to Chinese who have suffered in their property or persons in consequence of their being in the service of foreigners, including indemnities to the widows and orphans of Chinese who have lost their lives during the course of recent events by reason of their being in the service of foreigners.¹

1911-1912 Ten years later, during the Chinese revolution of
Rules: 1911-1912, the losses sustained by foreigners were also presented for payment. The foregoing principles were acted upon by the diplomatic representatives, and accordingly the following claims were disallowed:—²

Inadmissible Claims. (A) The losses of foreign municipalities arising out of:—

¹ The compensation for these losses was lumped together with the claim for the liquidation of military expenses incurred by the different powers. The grand total of both is Hk. Tls. 450,000,000 or £87,500,000. See *supra*, 15, and also *infra*, appendix A, Tables.

² Borchard, 426-427.

(a) Diminution of municipal income; (b) rents of houses paid in advance where occupation was prevented; (c) salaries and wages of employees whose services could not be turned to account owing to the revolution.

(B) The losses of foreign corporations, firms, and individuals, based upon:—

(a) Telegrams and similar charges necessitated by the abnormal state of affairs; (b) prospective profits not realised, owing to non-fulfilment or delay in the execution of contracts or other engagements entered into by foreigners with other foreigners or Chinese persons; (c) extra living expenses incurred by foreigners owing to enforced absence from the usual place of residence, and similar expenses incurred on behalf of servants and employees; (d) expenses of removing property to a place of safety and replacing it; (e) expenses incurred for reduction of staff and extra wages for employees; (f) freight, insurance and storage of stock-in-trade which could not be realised or suffered depreciation and expenses through congestion of stock; (g) interest on capital which could not be utilised owing to the revolutionary troubles;¹ (h) loss of prospective profit owing to partial or wholesale deterioration of stock-in-trade; (i) loss owing to fluctuation of exchange; (j) appreciation or depreciation of market prices and appreciation of freight and transport; (k) additional wages necessitated by the rise in price of labour.

(C) Miscellaneous:

(a) Principal and interest on provincial loans unpaid; (b) loss owing to inconvertibility or depreciation of Chinese government and provincial bills and paper money attributed to the revolution; (c) claims in respect of alleged illegal and unwarranted imposition of taxes during the disturbances; (d) certain other claims not considered attributable to the revolution.

Admissible Claims. The claims allowed may be summarised as follows:—

(A) In the case of merchandise destroyed or looted, the owner is entitled to compensation equal to the market value of the goods prevailing at the time of loss, or in the case of export goods to the contract price.

(B) In the case of damage caused to foreigners by the destruction, deterioration or loss of property, held by them as security, the indemnity is not to exceed the amount of the debt for which such security was given.

¹ Cf. *American Trading Company v. Chinese Indemnity Fund* (Boxer Fund), 47 Court of Claims, 563, 568.

(C) Indemnity to foreign municipalities for expenses incurred in the defence and protection of their property.

(D) In the case of private persons and firms:

(a) The property losses indemnified are to include goods, personal effects, money and documents of commercial value, salaries and other payments due under contract to foreigners in Chinese government service or institutions, unpaid owing to the revolution; (b) actual loss for non-fulfilment or delay in execution, owing to the revolution and through no fault of the foreign claimants, of contracts and other engagements entered into by foreign firms and individuals with the Chinese government, such loss including freight, reshipment, storage, insurance and loss or deterioration of goods; (c) travelling expenses of foreigners in Chinese official service to an adjacent place of safety and return journey, extra living expenses during absence, and rent of houses; (d) deposits of money or investments in Chinese government banks or other government departments, not recovered; (e) actual loss in industrial enterprises, such as damage to and deterioration of machinery and materials, resulting from unavoidable suspension or delay in working owing to local revolutionary disturbances; (f) rents not recoverable and rents paid in advance, where occupation and use were actually prevented by military operations or the acts of Chinese soldiers.

Amount of Claims. These claims originally totalled £3,000,000; but China objected, and the amount ultimately paid was half that sum.¹ Here we see an appreciable change of attitude. The measure of damages is not yet strictly just or equitable in the eyes of law, but the foregoing is a considerable improvement over the methods of assessment which prevailed before 1900. It is much to be hoped, therefore, that the sentiments of China in this direction will ere long be respected.

§ 88. CHINESE CLAIMS FOR COMPENSATION.

So much for foreign claims against China. We will now discuss Chinese claims against foreign governments. And it will be noted that the latter governments are always careful to preserve an air of injured innocence, which sounds strange in face of their insistence that China should indemnify their nationals' losses, irrespective of the merits of their claims.

¹ Cf. T. E. Harvey, M. P., in the *Contemporary Review*, March, 1914, 316-320; *East in the West*, October, 1915, 142-143. "Inasmuch as China, a weak country, was presumably given very little opportunity to object to the principles of liability determined upon, it may be assumed that these rules represent the widest measure of damages assessable against a government."—Borchard, 426.

Against Great Britain.

Chinese claims for compensation occurred chiefly in Great Britain, the United States and Mexico. In the first the principle of liability appears to be admitted. So when damage was done by a riotous mob to the property of Chinese residents at Cardiff in 1912, the claims for compensation were duly paid by the municipal corporation of that city under the provisions of the Riots Act, 1886. Two years later, after the outbreak of the present European War, an anti-German mob at Liverpool got out of order. And the Chinese losses sustained during the rioting were also paid under the same Act.

Against the United States:

In the United States, however, the principle of liability was not admitted. The air of injured innocence was maintained to the last, although in a later case an indemnity was paid, not in recognition of liability, but merely as an act of grace.

Denver Riots, 1881.

In 1881, an anti-Spanish mob created a riot at Denver (Colorado), and Chinese property also sustained much damage therefrom. The Chinese minister demanded the indemnification of these losses, but the Washington government asserted the principle of non-liability.

Liability not Admitted.

It declared that as the riots were suppressed within an hour from their outbreak, the local authorities had done all they could to restore peace and order. The injuries sustained by the Chinese residents were similar to those suffered by American citizens as well as other aliens, and therefore no claim for compensation could be entertained. Secretary Evarts added, that he knew "of no principle of national obligation, and certainly there is none arising out of treaty stipulations, which renders it incumbent upon the government of the United States to make indemnity to the Chinese residents of Denver, who.....suffered losses from the operations of the mob. Whatever remedies may be afforded to the citizens of Colorado.....are equally open to the Chinese residents of Denver.....This is all that the principles of international law and the usages of national comity demand."¹

Rock Springs Massacre, 1885.

Four years later, in 1885, twenty-eight Chinese residents at Rock Springs (Wyoming) were massacred and fifteen wounded by some 150 armed alien miners of that district. The rest of the Chinese population had to flee to the hills for safety. A similar demand for indemnity was made by the Chinese representative, the value of the property destroyed or pillaged amounting to over G. \$147,000.

¹ For. Rel., 1886, 104.

**American
Treaty,
1880.**

In an extremely able, lengthy despatch the Chinese minister, Cheng Tsao-ju, indicated the dissimilarities between the Denver and the Rock Springs cases. He pointed out how, in the present case, not only had his innocent countrymen been mobbed without the least provocation, but that no attempt was made by the local authorities to bring the murderers to justice. This was in breach of Article III of the American treaty of 1880, which provides as follows:—"If Chinese labourers or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favoured nation, and to which they are entitled by treaty."

Mr. Cheng reviewed exhaustively the nature of the claims for compensation which the American government itself had presented to the Chinese government on account of the losses sustained by its nationals in China, and he cited details of the American claims of 1858 which we have already noted. Therefore he requested that the Chinese sufferers at Rock Springs might *in consimili casu* be indemnified.

Non-liability

The territorial government, however, again denied **Reasserted.** all liability. In reply Secretary Bayard observed as follows:—"The government of the United States recognises in the fullest sense the honourable obligation of its treaty stipulations, the duties of international amity, and the potentiality of justice and equity, not trammelled by technical rulings nor limited by statute. But among such obligations are not the reparation of injuries or the satisfaction by indemnity of wrongs inflicted by individuals upon other individuals in violation of the law of the land. Such remedies must be pursued in the proper quarter and through the avenues of justice marked out for the reparation of such wrongs. The doctrine of the non-liability of the United States for the acts of individuals committed in violation of its laws is clear as to acts of its own citizens, and *a fortiori* in respect of aliens who abuse the privilege accorded them of residence in our midst by breaking the public peace and infringing upon the rights of others."¹

**Compensa-
tion ex
gratia.**

On the other hand, the American Secretary admitted:—"A measure of international obligation rests on the United States under the third article of the treaty of 1880." Besides, the indifference of the local authorities in this

¹ For. Rel., 1886, 166.

connexion had been strongly reprobated by the federal government, and President Cleveland himself had declared, in his annual message to Congress, that "the proceedings in the name of justice, for the ascertainment of the crime and fixing the responsibility therefor, were a ghastly mockery of justice."¹

Accordingly, the President of the Republic would recommend to the Congress, "not as under obligation of treaty or principle of international law, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly power, who, being peaceably employed within our jurisdiction, were so shockingly outraged, that in view of the gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed.....whether.....they would not, *ex gratia*, grant pecuniary relief to the sufferers in the case now before us to the extent of the value of the property of which they were so outrageously deprived, to the grave discredit of the republican institutions." But, said Secretary Bayard, the compensation, if voted at all by that body, was to be made "with the distinct understanding that no other precedent is thereby created or liability for want of proper enforcement of police jurisdiction in the territories."²

In the end, an indemnity of \$147,000 as recommended, was voted by Congress.

America and Chile. But this doctrine of non-liability, so loudly proclaimed, is overlooked by the United States in its dealings with China and other states similarly situated. For example, in October, 1891, a number of sailors from the American steamship, *Baltimore*, was attacked by a mob in the streets of Valparaiso, Chile. Regardless of precedents, the United States demanded satisfaction from the Chilean government. After some negotiations the latter paid \$75,000. Whereupon observed President Harrison, in his annual message to Congress:—"This has been accepted, not only as an indemnity for a wrong done, but as a most gratifying evidence that the government of Chile rightly appreciates the disposition of this government to act in a spirit of the most absolute fairness and friendliness in our intercourse with that brave people."³

Now these are strange inconsistencies. But, as has been observed by an American lawyer:—"There can be little doubt that the claim of

¹ 8 Messages and Papers of the Presidents, 385.

² For. Rel., 1886, 167-168.

³ 9 Messages and Papers of the Presidents, 315.

the Chinese government in the Rock Springs case was entirely valid and just.....But so long as the United States is willing to respond in damages on such occasions, it is not likely that any government will interpose an objection to her holding whatsoever views she may on questions of international law."¹

China and Mexico So much for the United States. As regards Mexico, the Chinese losses sustained during the Mexican revolution of 1910-1911 were settled by the convention of December 16, 1911.² In this agreement the Mexican government agreed to pay the sum of \$3,100,000 in Mexican currency. But here also the principle of non-liability was upheld, and it was distinctly stated that "this act of grace (voluntary and gratuitous indemnity) shall not be considered as establishing a precedent."³

¹ F. J. R. Mitchell, in 35 Am. L. Rev. (1900), 718.

² 8 Am. J. Int. Law (1914), Supplement, 147-150.

³ For Chinese losses in Nicaragua and the award of \$5,565.52 by the Nicaraguan Mixed Claims Commission, see Judge Otto Schoenrich, in 9 Am. J. Int. Law (1915), 861.

CHAPTER II

RELIGIOUS TOLERATION

§ 89. DEFINITION.

“The principles of the Christian religion, as professed by the Protestant and Roman Catholic churches, are recognised as teaching men to do good, and to do to others as they would have others do to them. Those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who according to these tenets, peaceably teaches and practises the principles of Christianity shall in no case be interfered with or molested therefor.”¹

This stipulation is no new dispensation. It merely confirms in black and white what aliens for centuries have enjoyed in China. The definition applies primarily to missionaries, but, of course, it also extends to all other aliens.

§ 90. EXTENT OF PRIVILEGE.

Residence in the Interior. The work of the foreign missionary being one of humanity, he is permitted to reside in the interior as well as the open ports. His right of acquiring lands or houses is not restricted to the open ports, but extends also to the interior. Accordingly, in the interior as well as the treaty ports he may lease lands in perpetuity for erecting churches, hospitals, schools, etc.

“Free Lance” Missionary. This right of residence in the interior is enjoyed, as a rule, by a missionary as such. But it has been held that even a “free lance” missionary, or one who is unconnected with any particular church or mission, is also entitled to such a privilege. In 1906, this subject was referred by the American minister to his government, and the Department of State replied as follows:—“An examination of these treaties clearly shows such a right to be legally non-existent; but with respect to certain localities in China, there is, nevertheless, an equitable or quasi-legal right based upon custom.....Notwithstanding its adverse opinion.....the department desires to recognise, and does not wish to weaken, any

¹ Art. 14, American 1903.

equitable or quasi-legal right which may have arisen from the customfor summer homes, and for various other purposes.”¹

Protection for Chinese Converts. The right of religious toleration applies equally to the Chinese converts. Accordingly, subjects of the territorial government may also embrace the Christian faith. If so, no restrictions shall be placed on their joining any missions or churches. They are not to be discriminated against by the local authorities. And nor are they to be compelled to pay taxes or “contributions for the support of religious customs and practices contrary to their faith.”²

Natural Use of Mission Property. As regards the landed property of the mission itself, it has been held that a missionary may make a natural use of it, so long as the purposes to which it is applied are in harmony with the mission’s proper work. *A fortiori*, a missionary may engage also in other non-evangelical activities, provided that the proceeds accruing from his personal service or manual labour are devoted to the support of himself and his family or transferred to the mission funds.

American Missionary in Kansuh. In 1897, an American missionary in Kansuh, working among the Tibetan border population, inquired of his minister at Peking whether he could lawfully engage in “agriculture, stock-raising, or trading in order to self-support.” Colonel Denby replied as follows:—“In no convention or treaty is anything said about the right to carry on by foreigners residing therein a regular employment in the interior. In practice, however, it is a common thing for missionaries all over China to engage in many species of employment which are considered as aids or adjuncts to their religious and charitable work. They have printing establishments, book-binderies, industrial schools, workshops, stores, dispensaries. They are doctors, colporteurs, newspaper correspondents, and one of them living here (Peking) lodges and boards strangers. All kinds of furniture are manufactured here and publicly sold by missions. Washing and sewing are done by the Catholic missions. In fact, there is complete tolerance of all kinds of workThe question of the right to engage in trade or commerce seems to depend entirely on tolerance. If the particular enterprise engaged in any locality is not prohibited by the officials and is allowed to be prosecuted without objection, it would finally be sanctioned by usage, and might be entitled to the protection of the treaty powers.”³

¹ Secretary Root to Minister Rockhill, in For. Rel., 1906, 278.

² Art. 14, American 1903.

³ For. Rel., 1897, 105-106.

**Attitude of
United
States.**

The above attitude was endorsed by the Washington government, and Acting Secretary Rockhill thus instructed Colonel Denby:—"The secular operations which you report as having been engaged in by various foreign missionary establishments in China, appeared to be partly direct or analogous adjuncts of their beneficent work and partly contributory to its support. Some of them, as the manufacture of furniture, laundrywork, and sewing, are not obviously part of the privilege of residence, and even if they were for any reason opposed, that circumstance would not impair the argument, which it is conceived might be validly advanced, the case arising, that the residential privilege embraces all normal uses to which the ground and its belongings can be applied. Residence upon a tract of agricultural land presupposes the devotion of the soil to its natural use. The permitted purchase of such land carries with it the right to till it for the owner's support and advantage. Viewed in this light, the rights accompanying the ownership of a farm seem to be more unquestionably evident than the rights appertaining to the possession of a dwelling house, since the use of the latter as a factory or shop is not a positive necessity, such as is the raising of produce where farm lands are held. The matter is, however, as you intimate, one of tolerant custom."¹

**Question of
Tolerant
Custom.**

Here we come upon a peculiar source of the alien's privileges in China—the question of tolerant custom. A certain thing is not expressed as permitted in the treaties or other state documents, but according to the treaty powers, that fact does not disentitle their subjects engaged in it from enjoying the protection of their own national officers. In the words of the American minister, the question "seems to depend entirely on tolerance. If the particular enterprise engaged in any locality is not prohibited by the officials and is allowed to be prosecuted without objection, it would finally be sanctioned by usage, and might be entitled to the protection of the treaty powers." Or, as Secretary Root put it, ten years later, in the case, already noted, of the "free lance" missionary:—"An examination of these treaties, clearly shows such a right to be legally non-existent; but with respect to certain localities in China, there is, nevertheless, an equitable or quasi-legal right based upon custom."

**Strange
Anomaly.**

Now such a situation is strangely anomalous. The right is legally "non-existent." It is only "an equitable or quasi-legal right based upon custom." The treaty powers cannot insist as of right that it should be tolerated by the local authorities. At the same time, "if the particular enterprise engaged in any locality

¹ *Ibid.*, 106-107.

is not prohibited by the officials and is allowed to be prosecuted without objection, it would finally be sanctioned by usage, and might be entitled to the protection of the treaty powers." We thus find the treaty powers themselves situated in an awkward position. Without serious loss of prestige to themselves they cannot compel China, by force of reason or law, to permit such a new departure from the treaties. But by lending their protection to their subjects, when a dispute in connexion therewith should arise, they appear to the world as deliberately violating the treaties they are pledged to uphold.

Treaty Con- The fact that some of the acts, hitherto tolerated, are
travention. not so vital from the point of view of the territorial sovereign as, for example, the alleged treaty right of hydrographic investigations, or the establishment of alien post-offices, does not absolve the treaty powers concerned from the charge of treaty contravention. If a right is "legally non-existent," then protection ought to be withheld from those who presume upon the good nature of the territorial government. Unfortunately, as long as the territorial sovereign is weak in the military sense, or as long as the rights of extraterritoriality in China are not abolished, it seems that the sense of respect for treaties entertained by the states, each committed to the safeguarding of different interests, will not always be the same. And if one state will not afford the necessary protection to its subjects, because the right is "legally non-existent," the latter may be driven to change their allegiance and seek the protection of another state who will protect them. The pressure brought to bear upon the parental state is therefore great, and very often for national reasons, the state in question is constrained to succumb to the pressure at the expense of respect for the sanctity of treaties.

§ 91. LIMITATIONS OF PRIVILEGE.

Privilege The right of proselytising having been specifically
Applicable conceded to a Christian missionary, an alien is not
to Christi- entitled to preach any other foreign religion in China.
anity only. Under Article IV of the Burlingame treaty, 1868, he may himself profess any or "every religious persuasion;" but that provision is silent upon the question of teaching or preaching any other faith. Accordingly, it is within the prerogative of the territorial sovereign either to grant or withhold such a privilege from an alien Buddhist or Mohammedan or any other foreign missionary. The latter cannot demand it as of right.

Case of For example, since 1905, several unsuccessful
Japanese attempts in this direction have been made by the Japanese
Buddhists. minister on behalf of some Japanese Buddhist missionaries. He pleaded that, as the teachings of Buddha also exhorted men

to do good, the Buddhists might under the most-favoured-nation clause be accorded the like privileges as Christian missionaries. The Chinese government, however, declined the authorisation. Christian evangelisation, said the latter, was expressly conceded by treaty, but not so Buddhism or any other alien religions. Moreover, the most-favoured-nation clause applied only to commercial privileges, and not to missionary questions.¹

**Meaning of
the Restriction.**

Now this limitation is only a restriction upon the foreign evangelist's right of making converts. He himself, of course, may profess any form of religion, and to that extent all religions are tolerated. But for the alien to preach any foreign religion in any part of the country is a different proposition. For very often there are other factors involved than the laudable object of teaching men to do good. For example, when the Japanese government, in January, 1915, presented the famous Twenty-one Demands upon China,² it reiterated its previous requests in favour of the Buddhists. In reply, the Chinese government observed as follows:—

**Question of
External
Factors.**

“The religions of the two countries are identical and, therefore, the need for a missionary propaganda to be carried on in China by Japanese does not exist. The natural rivalry between Chinese and Japanese followers of the same faith would tend to create incessant disputes and friction. Whereas Western missionaries live apart from the Chinese communities among which they labour, Japanese monks would live with the Chinese; and the similarity of their physical characteristics, their religious garb, and their habits of life would render it impossible to distinguish them for purposes of affording the protection which the Japanese government would require should be extended to them under the system of extraterritoriality now obtaining in China. Moreover, a general apprehension exists among the Chinese people that these peculiar conditions favouring conspiracies for political purposes might be taken advantage of by some unscrupulous Chinese.”³

**No Right of
Trade.**

Furthermore, the missionary's right of landholding and residence in the interior being granted in furtherance of his good work, it is, of course, understood that he cannot engage in trade or commercial pursuits as a merchant. This limitation holds good even in face of his alleged prescriptive right of engaging in pursuits of a semi or quasi-commercial nature. For the

¹ 40 New Collection (Japan), 24; Koo, 289-290.

² *Supra*, 17, footnote.

³ China's Official History of the Recent Sino-Japanese Treaties, 1915, 10.

latter is restricted to one of putting the mission property to suitable uses, or otherwise devoting the remuneration for his services towards the support of himself and family or of his own church.

Respect for Local Laws. The missionary dwells among the native inhabitants in the interior of the country. He is far removed from the supervision of his own consul, and so is expected to respect and conform to the local laws.¹ Of course, if he commits any offence or crime, he still has the right to be tried by his national officers.

No Interference with Converts' Litigations. He may use his good offices to promote the welfare of his converts. But he is not entitled to intermeddle with their litigations. He may intercede, on their behalf, before the local officials, but he is precluded from interfering with the administration of the law of the realm.

In previous years such interference, due perhaps to the zeal of the missionary for the interests of his converts, was a fruitful source of diplomatic negotiations between the territorial government and the missionary's own government. But recent years have seen a change for the better for all concerned. Or, as Sir Ernest Satow, the British minister, put it in his circular instructions to the British consular officers (Aug. 31, 1903):—"I am persuaded that if missionaries uniformly refrain from direct intervention on behalf of native Christians, and confine their action to representing to H. M. Consuls cases of actual persecution, such a course will redound to the preservation of peace between converts and non-converts, and to the spread of a genuine Christianity among the people of China."²

No Official Status. And if the subject of inquiry concerns himself or his church, he may approach the local officers in the capacity of a private individual. He is, however, debarred from the privilege of addressing them officially, or independently of his own consul. He has no official status, and therefore all official communications with the local officials must be had through his own consular officers.

In March, 1899, however, Roman Catholic missionaries were in consequence of French representations actually granted special privileges. These entitled them to hold official intercourse with the local authorities on a footing of equality.³ But these privileges were withdrawn on April 10, 1908. For, "since the regulations were promulgated, there have been cases where missionaries have arrogated to themselves the use of the official insignia of territorial officials, and have thereby given rise to misconceptions in the minds of the ignorant

¹ Art. 14, American 1903; art. 12, Swedish 1908.

² Morse, 430-431.

³ China, 1900, No. 1, 142; Cordier, III., 469-471; Rockhill, 424-425.

populace." Therefore, "in future, it shall only be necessary that relations between the territorial officials and missionaries shall, in accordance with treaty provisions, be conducted with courtesy." ¹

Status of Native Christians. Finally, the fact that a Chinese is a Christian convert does not alter his legal status. "Converts and non-converts, being Chinese subjects, shall alike conform to the laws of China; and shall pay due respect to those in authority, living together in peace and amity. And the fact of being converts shall not protect them from the consequences of any offence they may have committed before, or may commit after, their admission into the church, or exempt them from paying legal taxes levied on Chinese subjects generally, except taxes levied and contributions for the support of religious customs and practices contrary to their faith. Missionaries shall not interfere with the exercise by the native authorities of their jurisdiction over Chinese subjects; nor shall the native authorities make any distinction between converts and non-converts, but shall administer the laws without partiality, so that both classes can live together in peace."²

Chinese converts are, therefore, not denationalized by the act of admission into the church, as is popularly imagined. In fact, in view of the special protection which they enjoy as church members, they will not be permitted to abuse their privileges.

§ 92. THE MISSIONARY PROBLEM AND ITS SOLUTION.

"The missionary question in China being, in the opinion of the Chinese government, one requiring careful consideration, so that, if possible, troubles³ such as have occurred in the past may be averted in the future, Great Britain agrees to join in a commission to investigate this question, and, if possible, to devise means for securing permanent peace between converts and non-converts, should such a commission be formed by China and the treaty powers interested."⁴

Up to date no such commission has been formed. Nevertheless, it is satisfactory to note that recent relations between the Chinese and foreign missionaries or their converts have improved considerably. What were formerly known as missionary questions are now practically non-existent, and to-day we no longer hear of missionary riots and the consequential claims for indemnity.

¹ 101 State Papers, 960.

² Art. 14, American 1903; art. 12, Swedish 1908.

³ Namely, missionary riots and the resultant claims for indemnification by the Chinese government.

⁴ Art. 13, British 1902.

CHAPTER III

RIGHTS OF RECIPROCITY

§ 93. DEFINITION.

We come now to discuss what may be termed, in a restricted sense, the rights of reciprocity. But these rights are so few in number that the term "reciprocity" sounds almost like a misnomer. For, apart from the general provision that the subjects of each shall enjoy in the territory of the other the same treatment as that of those of the most-favoured nation, no reciprocal rights are conferred by the treaties. The reciprocity in respect of intercourse and representation between the contracting parties are political necessities, and therefore belong to a different category. Otherwise, the benefits are unilateral, not compensatory. That is to say, in return for the privileges granted by China to the treaty states or their subjects, there are no equivalent privileges, exemptions and immunities conceded by the latter in favour of China or its subjects. The exceptions to the rule appear to be limited in number, the nature of which will be here considered.

Exceptional In the case of the United States, however, special
Case of rights of reciprocity are granted and conceded on both
U.S.A. sides, *e. g.* in questions of opium, education and residence,¹ imposts and tariffs, etc.

Commercial In regard to the latter, Article III of the commercial
Treaty of treaty of 1880 provides as follows:—(Reciprocally)
1880. "The United States hereby promise and agree that no other kind or higher rate of tonnage dues or duties for imports shall be imposed or levied in the ports of the United States upon vessels wholly belonging to the subjects of His Imperial Majesty and coming, either directly or by way of any foreign port, from any of the ports of China which are open to foreign trade, to the ports of the United States; or returning therefrom, either directly or by way of any foreign port, to any of the open ports of China; or upon the produce, manufactures, or merchandise imported in the same from China or from any foreign country, than are imposed or levied on vessels of other nations which make no discrimination against the United States in

¹ *Supra*, 10, 111, and 179.

tonnage dues or duties on imports, exports, or coastwise trade; or than are imposed or levied on vessels and cargoes of citizens of the United States."¹

§ 94. SPECIAL EXTRADITION.

The first species of reciprocity we will discuss is the right of special extradition.

Swedish Treaty 1908. Article XI of the Swedish treaty of 1908, for example, provides as follows:—"If Swedish subjects in China, who have committed offences or have failed to discharge debts and fraudulently abscond in order to evade a summons or a warrant of arrest, should flee to the interior of China or take refuge in houses occupied by Chinese subjects or on board Chinese ships, the Chinese authorities shall, at the request of the Swedish consul, deliver them to the Swedish authorities. In like manner, if Chinese subjects in China, who have committed offences or have failed to discharge debts and fraudulently abscond, should take refuge in houses occupied by Swedish subjects in China or on board Swedish ships in Chinese waters, they shall be delivered up at the request of the Chinese authorities made to the Swedish authorities."²

Limited Extent of Right. Now this right of extradition is of a special character, and differs from that of general extradition. It is restricted to the houses or vessels of aliens in China, whether in the treaty ports or leased territories or even ceded territories. It does not avail to reach Chinese criminals fleeing to foreign countries and taking asylum therein. *A fortiori*, an alien subject of a treaty state fleeing from justice into the interior for a crime committed outside of China, does not in itself confer a right upon his own government to demand his surrender, or compel the Chinese authorities to give him up. If, however, the fugitive is a deserter or mutineer from on board an alien vessel in a Chinese port, then his surrender may be demanded.

Case of Horace McKinley. For example, in 1908, one Horace McKinley, a defaulting American financial agent, fled for refuge from the United States into one of the Chinese north-eastern provinces. The United States government requested the Chinese authorities to surrender him. But the former stipulated that the surrender was to be understood as only an act of grace, since it was precluded by its own constitution from granting reciprocity to China

¹ This provision was inserted in reply to China's protest respecting the discrimination, in 1880, against a Chinese vessel entering San Francisco, which had to pay higher tonnage dues than were paid by other foreign vessels.—2 Kuang-hsu, No. 4, 4-5.

² Cf. Art. 21, British 1858; art. 32, French 1858; art. 24, Japanese 1896.

in such matters. Accordingly, the request was acceded to by the latter on that understanding.¹

Furthermore, if an alien flees from the country and seeks refuge in a foreign territory, his surrender cannot be demanded.² And, similarly, if a Chinese criminal should flee to a foreign territory beyond the seas for an offence committed in China, his surrender or extradition cannot be demanded or compelled, for the treaty only speaks of seeking refuge in houses or vessels in China.

The Attorney-General for Hongkong v. Kwok-A-Sing. In 1873, Kwok-A-Sing, a Chinese subject, took part in the scuttling of a French vessel as well as the murder of its captain and officers on the high seas, while the vessel was sailing between Peru and Hongkong. Arriving at the latter port, he was arrested by the British authorities. The Canton authorities demanded his surrender, on the ground that according to Article IX of the treaty of 1843, he had committed "an offence or crime against the laws of China." His surrender was thereupon authorised by the latter government under a local ordinance of 1850, enacted in pursuance of the above treaty provision. Subsequently, the order to extradite the prisoner was revoked, and then the case was carried to England before the Judicial Committee of the Privy Council.

Not applicable to Piracy jure gentium. There it was held, in *The Attorney General for Hongkong v. Kwok-A-Sing*,³ that the respondent could not be extradited, on two grounds:—1. That it could not be assumed, without evidence, that there was any law in China to punish a Chinese subject for the murder committed upon a foreigner within a foreign territory; and (2) That, even if it could be so assumed, still the offence having been committed within the foreign territory ought to be treated as an offence against French, and not as an offence against Chinese law. The piracy was piracy *jure gentium*.⁴ That piracy, said the court, was not an offence against the law of China within the meaning of the ordinance. If the accused and his associates had committed an act against the municipal law of any nation, it was against that of France. And if they were punishable by the law of China, it was only because they had committed an act of piracy, which *jure gentium* was justiciable everywhere. If so, they could be tried by the British or any other authorities within whose jurisdiction they had

¹ For. Rel., 1908, 129-134.

² See *supra*, 55, for the De Menil case.

³ L. R. 5 Privy Council Appeals (1873-1874), 179-202.

⁴ Under the British Extradition Act of 1870, *piracy jure gentium* is, however, extraditable.

established themselves. And so there was no need surrender them to be tried by the Chinese authorities.

Now this right of limited extradition is unsatisfactory. Since it is not applicable to offenders who flee either from China, or any of the treaty states, the respect for law cannot but suffer serious impairment. We pointed out, in a previous section,¹ how when foreigners charged with serious offences are required to be sent home for final trial and punishment, the sequel is generally unknown to the Chinese directly interested, and how consequently the belief becomes inevitable that such criminals have escaped unpunished. If so, the restricted scope of this special extradition is a further aggravation of the situation. In the interests of justice, therefore, this right of limited extradition should be replaced by a general extradition treaty.

§ 95. APPREHENSION OF DEFAULTING DEBTORS.

Our next right of reciprocity deals with the apprehension of defaulting debtors.

British Treaty, 1858. Article XXII of the British treaty of 1858, for example, provides as follows:—"Should any Chinese subject fail to discharge debts incurred to a British subject, or should he fraudulently abscond, the Chinese authorities will do their utmost to effect his arrest, and enforce recovery of the debts. The British authorities will likewise do their utmost to bring to justice any British subject fraudulently absconding, or failing to discharge debts incurred by him to a Chinese subject."

Extent of Right. The obligation of each government is here limited to one of enforcing payment by its subjects; "but neither government will hold itself responsible for such debts."² If debts are due from the subjects of one state to those of the other, the latter may seek redress in law. And upon suitable representations being made to the local authorities through the consul, or *vice versa*, the latter will examine the premises and take proper steps to compel satisfaction. "But in case the debtor be dead or without property, or have absconded, the creditor cannot be indemnified according to the old system of the Co-hong so called."³

§ 96. PROTECTION OF TRADE-MARKS, PATENTS, COPYRIGHTS, ETC.

"Inasmuch as the British government afford protection to (registered) Chinese trade-marks against infringement, imitation or

¹ *Supra*, 54.

² Art. 24, American 1858.

³ Art. 16, American 1844; art. 23, British 1858. For the Co-hong system, see *supra*, 95.

colourable imitation by British subjects, the Chinese government undertake to afford protection to British (registered) trade-marks against infringement, imitation, or colourable imitation by Chinese subjects.”¹ Accordingly, the Chinese government will prohibit, by suitable legislation, its subjects from “infringing on, imitating, colourably imitating, or knowingly passing off an imitation of trade-marks” belonging to the subjects of the other contracting party.

A similar protection is mutually conceded in respect of patents and copyrights, duly registered according to the legal systems of each state. But “this Article shall not be held to protect against due process of law any citizen of the United States or Chinese subject who may be author, proprietor or seller of any publication calculated to injure the well-being of China.”²

§ 97. PIRACY AND SHIPWRECK.

Shipwreck. As regards shipwreck it is provided as follows:—
“Should a vessel of either of the high contracting parties be stranded or wrecked on the coast of the other, the local authorities shall immediately adopt measures for rescuing the passengers and crew and to give the most favoured treatment. In the case of a vessel sustaining injury, or being compelled for other reason to seek a place of refuge, such vessel shall be permitted to enter any near port and to anchor there temporarily, without being subject to the payment of tonnage dues. The cargo, if landed in order to effect the necessary repairs to the vessel, but not for sale, shall not be liable to pay duties, provided that it remains under the supervision of the customs authorities.”³

Salvage Operations. Where there are consular officers of the state of the vessel in distress stationed at the ports, they will have the sole management of the vessel’s salvage operations, etc. The local authorities will not interfere, except to maintain order or insure the interests of the salvors, of foreign sailors and passengers, or enforce the regulations respecting the disposal of the cargo. In the absence or non-arrival, however, of such consular officers, “the local authorities may adopt all measures for the protection of the individuals as well as the custody of the goods salvaged.”⁴

Piracy. In the case of piracy, the Chinese authorities will do their utmost to apprehend the criminals and restore

¹ Art. 7, British 1902; art. 9, American 1903; art. 5, Japanese 1903.

² Arts. 10-11, American 1903; art. 5, Japanese 1903.

³ Art. 6, Swedish 1903.

⁴ Art. 9, Dutch 1911.

any recovered property to its owners or their consul on their behalf. But, "if by reason of the extent of territory and numerous population of China, it shall in any case happen that the robbers cannot be apprehended, and the property only in part recovered, the Chinese government shall not make indemnity for the goods lost."¹ Accordingly, the foregoing was held by Commissioner Bradley, in the *Caldera* case, already cited,² to have exonerated the Chinese government from any onus of indemnification as well as non-suited the underwriters concerned.

Of course, if the local authorities can be proved to have acted in collusion with the robbers, then they will equally be severely punished, and their property confiscated to repay the losses.³ But piracy is an enemy to all mankind. Therefore, "in consideration of the injury sustained by native and foreign commerce from the prevalence of piracy in the seas of China, the high contracting parties agree to concert measures for its suppression."⁴

§ 98. MOST-FAVoured-NATION TREATMENT.

We come now to the last of the limited rights of reciprocity—namely, the stipulation respecting the most-favoured-nation treatment.

Peruvian Treaty, 1875.

Article XVI of the Peruvian treaty of 1875, for example, provides as follows:—"The contracting parties agree that the government, public officers, and citizens of the Republic of Peru, shall fully and equally participate in all privileges, rights, immunities, jurisdictions, and advantages that may have been, or may be hereafter, granted by His Majesty the Emperor of China, to the government, public officers, citizens or subjects of any other nation. In like manner, the government, public officers, and subjects of the Empire of China, shall enjoy in Peru all the rights, privileges, immunities, and advantages of every kind which in Peru are enjoyed by the government, public officers, citizens, or subjects of the most favoured nation."⁵

Accordingly, Chinese subjects residing or found in the territories of a treaty power, are entitled to receive the same treatment as that extended to and enjoyed by those of the nation most favoured by it. Or, in the alternative, they shall not be subject to other restrictions

¹ Art. 13, American 1858.

² *Supra*, 171.

³ Art. 13, American 1858.

⁴ Art. 53, British 1858; art. 9, American 1858.

⁵ *Cf.* Art. 54, Italian 1866; art. 43, Austro-Hungarian 1869; art. 16, French 1883; arts. 4-6, Swedish 1908.

and disabilities than those imposed upon the subjects or citizens of other favoured nations.

Now, the privileges accorded to China or its subjects under this provision by the treaty states cannot, of course, be compared with those granted by China to those states. For, as we have already seen,¹ this most-favoured-nation treatment is denied to the Chinese even in such elementary rights as those of admission and residence, the right to earn a livelihood, unhampered by any discriminations founded on racial prejudices, etc. Consequently, it may perhaps be more accurate to say that, in the cases we have already noted or discussed, the treatment accorded to Chinese, when residing in the territories of some treaty states, appears to be that of the least favoured nation. At any rate, the balance cannot be at all struck until the treaty arrangements between China and its treaty states are completely readjusted.

¹ *Supra*, §§ 37-38.

CHAPTER IV

THE MOST-FAVOURED-NATION CLAUSE

§ 99. DEFINITION.

In all treaties the most-favoured-nation clause is invariably inserted, the effect of which operates to confer upon the negotiating state any rights or privileges which China may have conceded, or may concede thereafter, to other treaty states and their subjects.

Now this little clause is "precious," but not omnipotent. Up to a certain point it is a useful lever. Beyond that, however, its applicability appears to stop short and its limitations begin to be clearly defined.

§ 100. EXTENT OF APPLICATION.

Commercial Grants. In its broadest sense the clause is applicable to rights and privileges of a commercial or economic character. Accordingly, in such matters as tariff imposts, right of trade, commerce and navigation, etc.,¹ no alien is to be discriminated against. If any modifications are to be introduced thereto, such amendments will likewise apply to all, and whatever extensions thereof are granted to one state will, *ipso facto*, be enjoyed by all.

No Favouritism to Grantor's Subjects. In some cases this clause, it seems, may even be invoked against the nationals of the grantor. Thus, China may impose a tax on the articles manufactured by alien subjects in its open ports, but "such tax shall neither be other than that payable by the Chinese subjects, nor higher."² Or it may prohibit an alien vessel from navigating a particular inland waterway, provided the regulation is equally applicable to a Chinese vessel.³

Case of China Merchants Steamship Navigation Company. For example, in 1890, an attempt was made to subsidise the native China Merchants Steamship Navigation Company, operating in competition with foreign companies, by remitting a portion of the import duties on goods imported by native merchants in their vessels, as well as

¹ Art. 9, French 1858; art. 45, Belgian 1865.

² Art. 3, Japanese protocol, 1896; *supra*, 125-126.

³ *Supra*, 135.

relaxing the customs examination of the personal effects of Chinese officials travelling therein. Subsequently, it was discovered that these exemptions would constitute a violation of Article III of the American treaty of 1880, which provides that no other or higher duties will be imposed upon American vessels or cargoes "than are imposed or levied on vessels or cargoes of any other nation or on those of Chinese subjects." The British minister at Peking protested, and the proposed exemptions were withdrawn.¹

§ 101. LIMITATIONS OF APPLICATION.

So much for the extent of the application. We will now examine its limitations.

Customs In the first place, the benefits of this clause cannot
Infractions. be availed of where infractions of customs regulations have been committed. For, in such cases, it will be remembered that the offending vessel or goods will be liable to confiscation by the Chinese government.²

Frontier The clause, indeed, applies to commercial grants;
Trade. but this only refers to those of a general character. The frontier trade between China and either Russia, or Great Britain, or France, or Japan, is concerned with interests common to both states. Consequently, such trade is regulated by a special rate of tariff dues and duties, which is equivalent to about two-thirds of that enforced at the open ports.

Swedish Now such an arrangement is based on mutual
Treaty, concessions, and no benefit can be claimed thereunder by
1908. a third party thereto.³ Article XIII of the Swedish treaty of 1908, expresses this limitation as follows:—"The high contracting parties reserve to themselves the right to conclude agreements regarding frontier trade with neighbouring countries, and it is understood that, in case either of the high contracting parties should hereafter grant to any other nation advantages subject to special conditions, the other high contracting party shall enjoy said advantages, only provided it complies with the conditions imposed therein or their equivalent, to be mutually agreed upon."

Landholding. In addition, we may cite the restriction upon the right of landholding in the interior, which enjoyed by missionaries is denied to other aliens.⁴

¹ Curzon, 337.

² *Supra*, 40, 45, 132, 134.

³ Art. 7, French 1895.

⁴ *Supra*, 150.

Practice in the United States. For example, in 1913, the Japanese ambassador at Washington protested against the disability imposed upon his nationals to hold land in California under Chapter 113, Statutes of California (May 19, 1913). He argued that under the most-favoured-nation clause, his fellow nationals were entitled to be exempt from that disability. The Department of State, however, replied, that "the most-favoured-nation clauses universally relate to matters of commerce and navigation; that alien ownership of land has seldom been treated in the practice of the United States as a matter of most-favoured-nation treatment, but has been secured only by special treaty stipulations."¹

Missionary Propaganda. Then there is also the limitation upon the right of missionary propaganda which, as we have already seen, is confined to those who teach the Christian religion. For it will be remembered that, when the Japanese minister at Peking attempted to secure a similar right of proselytisation for the Japanese Buddhists in China, on the plea of the most-favoured-nation clause, the Chinese government replied that that clause applied only to commercial grants, and not to religious questions.²

Political Grants. Moreover, such a clause cannot be applied to either a political or a conditional grant. As regards the grants of a political character, we see an attestation in the case of ports or territories leased to a few treaty states. For when the clause was appealed to by one or two of the others,—*e.g.* when Italy also demanded the lease of Sanmun Bay (Chekiang),—the dispensation was refused.³ And the fact that China succeeded in rejecting the Italian overtures, after she had submitted to the other great powers, shows the very hollowness of such a claim.

Conditional Grants. Finally, the fact that a grant is expressed to be conditional, or granted subject to specific conditions, is itself its own limitation. Or, as the same is expressed in Article I of the German treaty of 1880:—"In the event of special regulations for the execution of concessions which the Chinese government may make to foreign governments being attached to such concessions, Germany, while claiming these concessions for herself and for her subjects, will equally assent to the regulations attached to them.....Should German subjects on the strength of this Article claim privileges, immunities, or advantages, which the Chinese government may further concede to another

¹ 8 Am. J. Int. Law (1914), 578.

² *Supra*, 186.

³ Morse, Trade, 27.

power, or the subjects of such power, they will also submit to the regulations which have been agreed upon in connexion with such concession.”¹

Doctrine of Thus is embodied the modern interpretation of the
Equivalents. most-favoured-nation clause.² Whereas it used to be held that such a clause was of universal application, it is now recognised that its application falls far short of being universal or absolute. Apart from questions of a commercial character, it seems that any other grant would fall under the category of conditional grants, and a third state wishing to take under it like benefits will not be admitted to its enjoyment as a free gift. In the words of Secretary Sherman to the American minister, Mr. Buchanan, January 11, 1898:—“The allowance of the same privileges.....
Attitude of to a nation which makes no compensation, that have
the United been conceded to another nation for compensation, in-
States. stead of maintaining, destroys that equality.....which the most-favoured-nation clause was secured to secure. It concedes for nothing to one friendly nation what the other gets only for a price.”³

Mexican Accordingly, Article VI of the Mexican treaty of
Treaty, 1899 reads as follows:—“In case either of the high
1899. contracting parties should hereafter grant, of its own accord, to any other nation advantages subject to special conditions, the other contracting party shall enjoy the said advantages, only provided it complies with the conditions imposed therein or their equivalent, to be mutually agreed upon.”

Doctrine of It may, perhaps, be suggested that no such con-
Equivalents struction can be placed upon the grants contained in
Applicable some of the earlier treaties between China and foreign
to China. powers. Therefore, it may be claimed that it is still within the option of a state to avail itself of a benefit that was conferred upon the government or subjects of an earlier state. An English author, for example, suggests that Great Britain may yet follow Russia, and similarly establish a semi-commercial ecclesiastical mission at Peking.⁴

Rule of Treaty Now the above attitude seems to be untenable, since
Interpre- the doctrine of compensation or equivalents had already
tation. been acted upon when it was imported into China by the treaty states. The clause in question was inserted in the treaties

¹ Cf. Art. 10, Portuguese 1887; art. 6, Mexican 1899; art. 5, Brazilian 1881.

² See Stanley K. Hornbeck, in 3 Am. J. Int. Law (1909), 395-422, 619-647, 797-827.

³ Moore, V., 278.

⁴ Eames, 539-540. For the Russian mission, see *supra*, 4.

without even a full knowledge of its significance on the part of China, not to say its initiative. Accordingly, one can only have recourse to the meaning which the persons employing it usually attach to it in their mutual relations among themselves. In other words, when that clause was transplanted into the treaties with China, the negotiators had full cognisance of its extent and limitations. Consequently, those who desire to take any benefits under it must be held to have bound themselves to respect its limitations. The language of a treaty is to be interpreted according to its usual meaning, and when technical expressions are employed, they must be construed strictly according to their usual purport.

And in proof of the fact that the doctrine of
Resolutions of Two International Congresses. equivalents has come to stay, the resolutions of two international congresses may be cited. In 1909, the Pan-American Scientific Congress met at Santiago, Chile, and resolved as follows:—"The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favoured-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favoured-nation clause is granted, the respective governments should remain free to make special concessions to neighbouring countries."

Again, in 1902, the Dairy Congress in Belgium adopted a resolution in favour of either the abolition of the clause, or the insertion of a provision restricting it and specifying that its operation should not extend to the reduction of duties or the liberty of trade which one nation concedes to another nation on the basis of reciprocity.¹

¹ Hornbeck, *op. cit.*, 826.

CHAPTER V

TREATY INTERPRETATION.

§ 102. QUESTION OF UNIFORM STANDARD OF CONSTRUCTION.

At the close of our discussion the subject of treaty interpretation remains to be considered. We have purposely deferred this discussion, because having considered all the legal obligations in their various aspects, we are now in a position to take up the subject of treaty interpretation.

Diplomatic The interpretation of treaties is always fraught with
See-Saw. consequences and beset with difficulties. But in the case of China and other states, these are intensified. For there is here no one standard of construction which is recognised as final by the treaty states themselves, not to mention China as well, but one long diplomatic see-saw. The treaties were not concluded with the consent of China, but their stipulations were wrung from her, heedless of her protests. If the territorial sovereign interprets a treaty *strictu sensu*, the treaty states must, as a matter of policy, resist that interpretation. For, if future claims or benefits in favour of their nationals are not to be effectively barred, the foreign powers must contest the same. And this is not so much to obtain the benefits in question as to prevent, by a policy of passive resistance, a further diminution of the alien's privileges in China.

On the other hand, if a treaty state construes a stipulation to its advantage, the territorial sovereign must resist such one-sided construction. For, were it not contested, it would be considered as acquiesced in. If so, it would open the way for other states to claim a like grant or privilege under the most-favoured-nation clause. We presume, of course, that the privilege in question is one which is claimable under the most-favoured-nation clause, and not one which is unclaimable. For an illustration we need only cite the anomalous case of foreign business houses in Peking.¹

Resultant Consequently, controversies over legal questions not
Disputes. infrequently arise. And some of these disputes we have already noted. There are, for example, the disputes over the exact

¹ *Supra*, 146-147.

limits of treaty ports,¹ the definition of the most-favoured-nation clause,² the exact limits of territorial waters,³ the extent of the right of foreign warships visiting Chinese ports, etc.⁴

Need of Uniformity. Now such a position is unsatisfactory, and the need of an accepted, uniform rule of treaty interpretation is therefore urgent. It is a matter for congratulation that, in the past, its awkwardness has not been felt so acutely as to disturb or impair the peaceful relations between the contracting states. Nevertheless, it is short-sighted and unstatesmanlike to neglect to prepare for future eventualities. It is true that, in pursuance of the Hague conventions, disputes concerning "questions of a legal nature, and especially in the interpretation or application of international conventions," may be referred to arbitration. Unfortunately, however, the recourse to an international tribunal is only expressed as "desirable," not compulsory.⁵ Under the circumstances, it may be submitted with confidence that it is obviously the safer plan to devise an effective remedy, recognised as binding upon the contracting states, than to rely upon a benevolent intention to have recourse to arbitration, however "desirable" or praiseworthy the latter may be.

§ 103. PRESENT LACK OF UNIFORMITY.

If a treaty is to be properly interpreted, the contracting parties ought to agree on the question of authoritative text, in the event of divergences of opinion arising between them concerning the interpretation of treaty stipulations. But in the understandings between China and its treaty states, there is no one universal rule respecting the standard text in the event of such differences of opinion.

Significance of the Problem. In this we do not mean to suggest that when, for example, Great Britain negotiates with China, its treaty does not contain any stipulation as to whether the English or Chinese, or any other language, is to be the text of authority. Such an omission would reflect seriously on the competence of its plenipotentiaries, if it were true. But, as a matter of fact, the stipulation respecting the text of authority is invariably inserted in these treaties.

What we mean to suggest, however, is the lack of a text to meet the exigencies of the peculiar situation in China. For, when the nationals of one state are charged with a treaty contravention,

¹ *Supra*, 96-98.

² *Supra*, 186.

³ *Supra*, 46-48.

⁴ *Supra*, 136-138.

⁵ *Supra*, 33-34.

and representations are made by the territorial authorities to the government of the aliens concerned, the latter will rely on the text of authority stipulated in its treaties with China. But when the same state wishes to secure a grant or dispensation from the territorial government which, though enjoyed by other states, is not contained in its own treaties, it will invoke the aid of some other recognised text of authority and claim to participate therein.

Three Different Rules.

English Text.

French Text.

Own Text.

Resultant Confusion.

Treaty Powers' Choice of Text.

According to the present state of affairs, there are three different rules, according to which the eighteen treaty states may be said to range themselves into three camps. In the first there are nine states—Chile, Denmark, Great Britain, Japan, Mexico, Peru, Portugal, Sweden, and the United States—in whose treaties it is provided that the English shall be the authoritative text.¹ In the second there are five—Brazil, France, Germany, Holland, and Russia—who agree upon taking the French as the text of authority.² As regards the rest—Austria-Hungary, Belgium, Italy, and Spain—it is stipulated that the language of each contracting party shall be the correct text.³

Now such methods of procedure cannot be looked upon with satisfaction. For events may arise, if they have not already arisen, in which China's interpretation may be accepted by one group but not by the others.⁴ And as China is entitled under her treaties with the third group to recognise the validity of her own text only, the controversies in such cases may be interminable.

For example, if an Englishman or American were found in the interior of China without a passport, he will be handed over to the nearest consul for punishment. But he will not be liable to a fine of Tls. 300, unless he were a German or Japanese or Swede,⁵ simply because the provision about the fine is not mentioned in either the British or American treaties. On the other hand, when foreign warships navigate China's inland waters, the United States is prepared to follow suit, although

¹ Art. 4, Chilean 1915; art. 50, Danish 1863; art. 20, British 1902; art. 28, Japanese 1896; art. 18, Mexican 1899; art. 17, Peruvian 1874; art. 19, Portuguese 1904; art. 17, Swedish 1908; art. 21, American 1903.

² Art. 15, Brazilian 1881; art. 5, French 1884; art. 5, German 1861; Dutch, 1915 (*infra*, appendix C); art. 20, Russian 1881.

³ Art. 5, Austro-Hungarian 1869; art. 8, Belgian 1865; art. 50, Italian 1866; art. 51, Spanish 1864.

⁴ See *supra*, 51, for the American and British endorsement of China's attitude respecting jurisdiction over non-treaty subjects, in connexion with the case of a Montenegrin in Harbin.

⁵ See *supra*, 141, footnote 1.

no provision about the subject is contained in its own treaties. But, as the Washington Department of State put it, in the case of the *Villalabos*, already noted:—"Even if this right was not explicitly granted to us by treaty, Rear-Admiral Evans is unquestionably right in using it when like ships of other powers are constantly doing so This Department thinks, however, that Art. 52 of the British treaty of 1858 with China, which is reproduced in Art. 34 of the Austro-Hungarian treaty of 1869, gives full authority for his course."¹

China's Dilemma. This choice of text is, however, not permitted to China. She is, so to speak, the rich grandmother whose duty is but to grant favours and endowments. So in the eyes of her treaty states, she cannot pick and choose her arguments wherewith to refuse the demands made upon her generosity. For, were she to do so, she could easily seize upon the text most favourable to her and repudiate all overtures. And, in illustration, we may cite the case of the *Tatsu Maru*, already discussed.² According to the various treaties the exact limits of a state's territorial waters are not mentioned. But according to Article XI of the Mexican treaty of 1899, the limits are fixed at nine miles, or "a distance of three marine leagues." Now, if China could claim the benefit of this three-marine league rule against Japan, then the *Tatsu Maru* would have been condemned. But Japan was not prepared so to do and, it will be remembered, the case was settled by diplomatic means.

This attitude is surely unfair to China. It places her in an awkward dilemma, and robs her of the satisfaction of knowing that justice is not always partial, but can be impartial.

§ 104. NEED OF UNIVERSAL AUTHORITATIVE TEXT.

The need of a universal authoritative text is, therefore, urgent. And under the circumstances, it seems imperative that some attempt at uniformity should be agreed upon.

Object of Universal Text. The object of such a universal text is to devise a rule of interpretation which will be acceptable to all concerned. That is to say, its purpose is to supersede the present state of confusion arising out of the three different rules of construction. So that, in future, the interpretation of a treaty by one state shall be recognised as valid by China, and *vice versa*. To achieve such an end is admittedly difficult, considering the great diversity of languages represented in the array of treaty states. Nevertheless, the task is one which must be accomplished, if the peaceful relations of China and its neighbours are to be preserved.

¹ *Supra*, 137.

² *Supra*, 46-48.

Grantor's Text.

For want of definite rules of guidance it is not easy to determine what this universal text shall be. But from the circumstances of the case, it may perhaps be suggested that such a text may be either the grantor's language or one which is most universally understood. The treaty relations between China and other states are unilateral in character, and the favoured states are so many recipients of gratuitous grants and privileges. Consequently, the legal obligations arising out of such relations are one-sided, and the benefits enjoyed by the beneficiaries are unreciprocated. It is the grantor who has to perform all the obligations. If so, he should have full knowledge of the nature and extent of the burdens he has to discharge. In other words, the conventions should provide that the language of the grantor shall decide, whenever differences of opinion should arise between the contracting parties regarding treaty interpretation.

German

Such a provision may sound novel, but it is not **Precedent**, without precedent. Article VII of the German treaty **1880.** of 1880 provides that a passport, issued to an alien travelling in the interior, shall be valid for twelve months. But "travel" may be variously interpreted. Accordingly, in an exchange of notes between the two plenipotentiaries, it was agreed that in the interpretation of the words "Yu lih" (travel or excursion), the Chinese text was to govern.¹

Now this point is not without significance. For it will be remembered that, when an alien trader goes into the interior to purchase native goods for exportation abroad, he must take out a passport, and must return to the open port when his mission is accomplished.² In this case, the period of validity of his passport will not be one year, but only two or three months. Whereas if he were travelling in the interior merely for pleasure, or as an excursionist, his passport would be valid for twelve months. Therefore, the Chinese text will determine the period of validity of a passport so issued.

Possible

Objection. In the interpretation of treaties it is usual to claim that, "while contracting states may avail themselves of any standard of interpretation convenient to their purpose, no party to a treaty can rightly invoke one known only to itself."³ Accordingly, the suggestion about the grantor's text may be objected to on the ground that it will give the grantor an unfettered power over the interpretation of his treaties. Or that it will vest in him the power to restrict the extent of his grants, even though they are capable in their

¹ 1 Knang-hsu, No. 3, 13-14.

² *Supra*, 144.

³ Dr. Charles C. Hyde, in 3 Am. J. Int. Law (1909), 47.

usual interpretation of a wider signification than will perhaps be admitted by the grantor.

Objection Now the obligations contracted by China are, in the

Answered. main, not reciprocated or compensated by the treaty states. Therefore, it may be questioned how far the objection, which refers to a treaty the contracting parties of which negotiate on equal terms, can be maintained. The obligations are so many grants, pure and simple, in favour of the beneficiary states. Therefore, it is natural for them to place upon the treaties as wide an interpretation as can with reason be upheld. But the majority of these grants, as we have already seen, are positive derogations from the grantor's rights of sovereignty. If so, he cannot be denied his prerogative of indicating the extent of the privilege he intends conceding, or the scope of the grant he intends delegating. To hold otherwise is to impose an intolerable burden upon the grantor. For, not only is he to make the grants which deny him his full rights of sovereignty over his own dominions, but he is also to accept the interpretation placed upon them by those who are their beneficiaries thereunder. If so, constant friction is inevitable.

Most The above possible objection may not be serious.

Universal Language. But if it is persisted in, we will be no nearer the goal than when we first started. Accordingly, in order to attain the much desired uniformity, we are constrained to fall back upon a rule that should prove acceptable to all parties.

The readiest expedient for such a purpose will be to adopt as the authoritative text a language which is best known to all treaty states. Now, this language may be either the English or the French. For,

English. against the French, it may be advanced in favour of the

English text that the number of states using the latter is greater than that of those using the former. Whereas,

French. against the English, it may be noted that the official text of the "Boxer" protocol, 1901, as well as of the Hague, Geneva and other universal conventions is French. Each has, therefore, its cogent claims and each is entitled to our respect.

A Suggestion. Whether the universal authoritative text is to be

English or French must, of course, be left to common agreement. But if we may hazard a suggestion, it seems that English is perhaps the most suitable for this purpose. For the Anglo-Saxon tongue is the *lingua franca* in the East, and in China itself it enjoys the greatest popularity among foreign languages. Nevertheless, the matter is essentially one for the proper consideration of all treaty powers. The solution of this urgent problem has long been overdue; so the sooner a uniformity is established, the better it will be for all concerned.

CONCLUSION

§ 105. NEED OF TREATY REVISION.

We have analysed the legal obligations arising out of treaty relations between China and other states, and our task is ended. We have shown what are the rights and privileges of the aliens in this country, and also what are the limitations or restrictions upon these grants and privileges. We have also shown what are the burdens which the territorial sovereign has to discharge towards the treaty states, and also what are the imperfect rights of the Chinese residing in the territories of some of these states. It remains for us to consider the moral which stands revealed in this extended analysis — namely, the need of a thorough revision of the present treaty relations between China and other states.

Vagueness of Present Treaty Language. In the preceding pages we have indicated the urgent need of such a revision. The provisions of the treaties are worded indistinctly or ambiguously. The treaties themselves were concluded without the willing consent or full knowledge of China, the principal state. Their language appears to have been purposely worded loosely, so that the beneficiary states may interpret them according to the flexibility of the circumstances arising. Such a suggestion may sound uncharitable, but from the circumstances of the case the impression is irresistible. The stipulations of the treaties are conspicuous for their vagueness and indefiniteness. Consequently, we have the disputes about the exact limits of treaty ports, of international settlements, of demarcated areas, etc.¹ If the provisions had been worded explicitly, and their meaning rendered clear-cut and unequivocal, such divergences of opinion would never have arisen. But add to this looseness of phraseology the absence of a universal authoritative text, and confusion inevitably results.

Possibility of Serious Disputes. The above disputes are principally what may be termed as academic disputes. They do not seriously disturb the peaceful relations of the contracting parties. But controversies may arise which lend themselves to a bellicose *dénouement*, and what diplomacy fails to accomplish may have to be settled by the arbitrament of the sword. Such a situation is indeed rare, and this may be a cause for congratulation. But the fact that

¹ *Supra*, 96-98, 102-103.

such differences do exist—*e.g.* the dispute over the seizure of the *Tatsu Maru* and the territorial waters limit¹—is certainly a sufficient warning that they should by all means be obviated. The peaceful relations of the contracting parties are too precious to be risked lightheartedly. Consequently, instead of letting the present sleeping dogs of confusion lie, hoping that nothing will happen to disturb their slumber, all possible means should be adopted to remedy the situation and prevent future disasters.

§ 106. INTERNATIONAL STATUS OF CHINA.

Accordingly, the present treaty relations need to be promptly overhauled. The vagueness of the treaty language as well as the possibility of serious disputes should suffice to counsel such a revision. But if further reasons are necessary, then we may advance two further arguments—namely, the international status of China and the doctrine of *rebus sic stantibus*.

Former Opinions of Foreign Jurists:

W. E. Hall.

As regards the first, it was not so very long since distinguished foreign jurists were dubious how far China had entered the pale of public law. Hall, for example, asseverated a quarter of a century ago:—"Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind."² And Professor Thomas Erskine Holland similarly remarked:—"The Chinese have adopted only the rudimentary and inevitable conceptions of international law. They have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained."³

Theory of Europe's Consent.

In the opinion of many jurists, China as well as other states can be admitted to the privileges of international law only on the express consent of the

¹ *Supra*, 46-48.

² International Law (1909), 40. To the foregoing Atlay, Hall's editor, appends the following note:—"The mere fact that the Chinese government was invited to send representatives to such an assemblage (Hague peace conferences) may be taken as an acknowledgement of its international status. How far China might be held to have forfeited her position by the gross breach of comity involved in the assault of the Peking legations in the summer of 1900, was for some time a matter of speculation, but her inclusion among the powers invited to the Hague in 1907 set the matter at rest."—*ibid.*, 41.

³ Studies in International Law (1898), 129.

nations of Europe. International law, they say, originates from Christian Europe, and so any non-European state wishing to enter the charmed international circle must first secure the former's consent.

Criticism by Prof. P. M. Brown. Now such an attitude is not only false, but ironical, when one recalls how cynically disregarding of the basic principles of international law the European powers have been. As Professor Philip M. Brown put it:—"It would seem ludicrous to assert that states do not exist, and are subject to no rights under international law, simply because they have not been recognised and, as it were, given proper social standing. Nothing could be more unjust as well as arrogant than the claim that the nations possessing European civilisation were the sole arbiters of the rights and obligations of other nations under international law."¹

Present Recognition of China's Status. That was the foreign opinion of former days. To-day, however, all doubts about China's international status have been settled. For she has participated not only in the Hague, Geneva, and other universal conventions,² but she has also taken part in such minor international gatherings as legislated for the white slave traffic, protection of birds, bills of exchange, prison reform, hygiene and sanitation, etc. Therefore, "considering her rapid development of late, her increasing relationships with the West, her efforts to regularise her government, and to fall in line with the conceptions of international intercourse entertained by the civilised communities of the world, it may be said that, notwithstanding certain restrictions imposed upon her, she (China) is now a member of the international circle."³

§ 107. DOCTRINE OF *REBUS SIC STANTIBUS*.

To say that the present treaties ought to be revised because the international status of China has been recognised is to state only half the truth. What is still more important, however, is the fact that the bulk of the obligations, which the principal state has to perform, was contracted as much as even half a century ago.

Question of Self-Preservation. The conditions contemplated at that date have ceased to exist and, with the flight of decades, there has been a vital change of circumstances. These obligations now fetter the free growth and the natural development of the new Republic, to the serious menace of even its self-preservation. For example, in matters of neutrality in the present European war,

¹ Article on Equality of States, in 9 Am. J. Int. Law (1915), 310-311.

² For a list of China's signatures and adhesions, see *supra*, 1.

³ Phillipson, Wheaton, 20.

she cannot observe strict neutrality. For, as we have already shewn in the case of Kiaochow's neutrality, neutral China must under the international protocol of 1901, permit foreign troops to be stationed in her own capital and metropolitan province.¹ Under the circumstances, China is entitled to the protection of the doctrine of *rebus sic stantibus*. Accordingly, she can demand that her treaty arrangements should be immediately revised, so as, on the one hand, to harmonise her rights and prerogatives with her duties and obligations in the present world conditions, and on the other, to reserve to herself full liberty to develop her institutions in her own way.

Rebus Sic Stantibus. In making such a legitimate claim, China is but fulfilling her primary duties as an independent state. For as Professor L. Oppenheim put it:—"The vast majority of publicists, as well as all the governments of the members of the family of nations, defend the principle *Conventio omnis intelligitur rebus sic stantibus*, and they agree, therefore, that all treaties are concluded under the tacit condition *rebus sic stantibus*. That this condition involves a certain amount of danger cannot be denied, for it can be, and indeed sometimes has been, abused for the purposes of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness.

A State's Primary Duties. "But all this cannot alter the fact that this exceptional condition is as necessary for international law and international intercourse as the very rule (*pacta sunt servanda*). When, for example, the existence or the necessary development of a state stands in unavoidable conflict with such state's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every state. No state would consent to any such treaty as would hinder it in the fulfilment of these primary duties. (The consent of a state to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and development, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said state's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable."²)

§ 108. RECOGNITION OF ACCOMPLISHED FACTS.

Therefore, to amend the existing treaties is but to recognise accomplished facts. By her participation in the Hague and other universal acts, China has been formally received into the international

¹ *Supra*, 83.

² International Law, I, 572-573.

circle, unconditionally, and an equal among equals. (Such international status predicates certain fundamental qualifications—namely, independence and sovereignty—which every member must possess.) But under the present treaties, China is not completely free and independent. She cannot do what she likes, but must be bound by her treaty stipulations. And the obligations she has to discharge derogate from her rights of sovereignty and even fetter her independence of action—a position which is diametrically opposite to what is presupposed in her status as an international member.

Restoration of China's Inherent Rights. Now, since her independence has been acknowledged by the treaty as well as non-treaty states, it is but just and proper that all impairments of her sovereignty should forthwith be abrogated, and all her rights and attributes as a full member of the international circle be restored to her. For her co-signatories or co-accessories to welcome her into their charmed society at one breath and, at the next, deny her her fullest prerogatives as an independent sovereign state, is disingenuous and hypocritical. The self-contradiction impugns the former's good faith, and it cannot be confidently advanced that such is within their contemplation.

Vital Change of Circumstances. Moreover, the conditions contemplated by the negotiators when the present treaties were concluded, have in the flight of decades, as we have already said, materially altered. The China contemplated then was an old, decrepit empire, plodding along as best it could, while its vigorous neighbours were forging ahead. It had not long to live and was, perhaps, crawling to its last resting place. If so, it was no great injury to its *amour propre* to treat it as a child, while ostensibly preserving some semblance of respect for its age.

But that was long, long ago. The China of to-day is no longer that of yesterday. Like the awakened sleeper, who wakes up after his long slumber to find that his colleagues have gone far ahead, he is trying his level best to make up for lost time and lost opportunities. Much refreshed and reinvigorated, he is putting forth all his efforts to overtake his companions. The problems he has to solve are complicated and numerous. If so, he deserves every assistance from those who wish him well. Accordingly, for the treaty states to continue to treat such a China which is daily struggling to regain its lost prestige, is to add new insult to the old injury. (More than that, it is to deny to China the benefit of the *rebus sic stantibus* doctrine, while applying it to their own relations one with another.) Such an ungenerous attitude in the international relations of states who are co-members of the Family of Nations is surely inconceivable. Accordingly, we may look forward to better days.

Illegality of Force. Finally, in fairness to China, the fact is not to be overlooked that the obligations she has to discharge were not contracted voluntarily, but imposed upon her by superior force. They impair her rights of sovereignty and create for the subjects of treaty states a more privileged position than that accorded to her own subjects. If she seeks legitimate means to restrict the extent of her grants, it may be easy for the beneficiaries to call it a treaty evasion, a treaty violation, a case of international *mala fides*. But under identical circumstances, it seems hard to conceive that any other nation will not do likewise. The idea is unedifying that the legality of the status of aliens in China is founded upon, as well as maintained, by the illegality of sheer force, and that at any moment China's arguments may have to be respected, if they were effectively supported by the same agency which now serves to keep them in abeyance. To the alien the reflection cannot be comfortable; to the Chinese the sense of injustice is keen.

§ 109. MUTUAL CONCESSIONS THE BASIS OF TREATY REVISION.

In view of the foregoing reasons, it is abundantly clear that the treaties require to be revised and amended at any early date. This revision has long been overdue, and to hasten its accomplishment is to hasten the reign of peace and goodwill in all international relations between China and the world.

Principle of Reciprocal Compensations. It is needless here for us to indicate the directions such revision should take. In fact, a perusal of the previous pages will have suggested the necessary amendments. But however the treaties may be revised or modified, this much seems to be apparent. If the revision is to fulfil its functions, the principle to be adopted must partake of the nature of mutual concessions or reciprocal compensations. Or, as was put by Dr. Wu Ting-fang, then Chinese minister to the United States:—"Nations now enter into friendly relations with each other, because it is believed that both sides are benefited by such relations. Their transactions cannot be a one-sided affair, for the simple reason that it takes two to make a bargain. Therefore, if permanent relations are to be established between two nations, reciprocity must be the key-note of every arrangement entered into between them."¹

Trade versus Jurisdiction. For example, if the alien is to be granted extended rights of trade and residence, the grantor's right of jurisdiction must be respected, and he be given complete liberty to legislate upon fiscal as well as other matters. In the interests of international commerce the entire country should be opened to foreign trade and residence. But China must also be given the

¹ 171 North American Review (1900), 1-2.

right to exercise her jurisdiction over the person and property of all aliens dwelling within her territory. China desires trade as much as any other nation, and so is willing to open every nook and corner of its territory. But is the alien prepared to submit to Chinese jurisdiction?

**Changsha
Li-kin
Case, 1905.**

This was illustrated, in 1905, in the arguments of the Changsha *li-kin* case. Some British goods at that port were made to pay the *li-kin* tax when found within the walled native city. The British minister at Peking protested, on the ground that as Changsha was an open port, such imposition was illegal. He therefore requested the Wai-wu Pu to instruct the governor of Hunan that the intramural city was a part of the treaty port, and so no *li-kin* was to be levied on foreign goods found therein and protected by the proper passes.

**China's
Reply to
the British
Protest.**

The Pu, however, replied as follows:—"According to its real meaning, the word 'port' does not include the moat or area within the city wall. If the Chinese are unwilling to have foreign merchants settle outside the limits of a port, they have some grief at heart, namely, that China is not allowed to exercise jurisdiction over foreign subjects within her territory. If, in accordance with Article XII of the Anglo-Chinese treaty of commerce of 1902, extraterritoriality is relinquished, there will then be no objection to according to foreigners the liberty to live wherever they like."¹

**Give and
Take.**

Here we have only taken the case of trade *versus* jurisdiction, because it can be most readily understood. But the principle of reciprocal compensations ought to be applied to other pertinent matters. For if two parties are trying to devise an arrangement which will satisfy both, then the rule of reciprocity should be the guiding principle. In other words, there must be both give and take, and not all give and no take. For only then can the resulting obligations be mutual and not as, at present, one-sided or unilateral.

§ 110. NEED OF INTERNATIONAL CO-OPERATION.

With the sight of the awful carnage raging in Europe to-day, men's minds turn instinctively to thoughts of peace. And as the atmosphere slowly reeks with smoke and blood, distracted humanity yearns for peace. But peace is not to be had for the mere asking. For to insure peace, nations must learn to think in terms of peace, not in those of aggression. This surely is the lesson which the present conflagration demonstrates to those who are to reshape this war-ridden world at the *post-bellum* conference.

¹ 7 New Collection (Great Britain), 3; Koo, 248-249.

Panacea of All Evils. Now to insure perpetual or, at least, an enduring peace, nations must learn to co-operate one with another. For if we deny a nation the liberties, the rights, which properly appertain to it, we sow the seeds of future conflicts. As we sow, so shall we reap. Similarly, in the case of China and its treaty states, international co-operation must be the panacea to all known evils. If peace in the Far East, as well as the rest of the world, is to be preserved, the contracting parties will have to treat one another with equal respect and consideration. The injustices, the inequalities, the inconsistencies of the past must be abolished, and a rational basis of mutual intercourse substituted. For it is only by means of such co-operation that the relations between China and other states can hope to rest on a stable foundation.

Vision of the Future. We are told that as poison fights poison, so the present Armageddon in Europe will kill future wars. If so, the terrible drain of life and wealth will not have been made in vain. For after this nerve-shattering ordeal, men's hearts will also have been purged and renovated. And then poor humanity will be in a better mood to listen to reason.

After the great wind which rent the mountains, after the fire and earthquake, the still small voice of Justice and Righteousness will be heard. Then out of this holocaust a new world will be born, a new system will be established, and a new *régime* will be constituted, under which all nations will be "free to live their independent lives, working out their own form of government for themselves, and their own national development, whether they be great nations or small states, in full liberty."¹ And when that day shall dawn nations and peoples, cabinets and parliaments, will arise to do homage to the sceptre of Justice.

China and the World. Now, that is the vision which all firm believers in the progress of mankind will behold when the present conflicting passions shall have subsided. And we who have implicit confidence in the ultimate triumph of law and order, look forward with calmness to the days when international law and justice will reassert their sway. In that confidence lies our hope that treaty relations between China and other states will be readjusted on rational principles—principles under which all communities may live freely and contentedly, principles which are consecrated by the acclaim of all ages, principles which build up as well as perpetuate mutual intercourse between states on solid, immutable foundations.

¹ Viscount Grey, London, Mar. 22, 1915.

APPENDIX A.

Analysis of China's Treaty Relations with Other States (10 Tables)

EXPLANATORY REMARKS:—

(1) It being the general rule for a document to deal with several matters simultaneously, this is shewn in the tables by the recurrence of the same date on the same line in the different columns.

Any addition thereto—e.g. name of a month or sometimes a date—signifies a separate instrument.

(2) Without unduly expanding the size of the charts, the “Miscellaneous” column is inserted to include all minor details.

When the document is concerned with an unclassified particular subject, the matter is specified within brackets.

(3) The “total” here refers, not to the number of treaties, etc., concluded by the state in question, but to the number of times that state was a signatory thereof.

Thus, the “Boxer” protocol of 1901 and the conservancy agreement of 1905 are two documents, each containing the signatures of the same eleven states. These are, therefore, to be met with in the tables of the signatory states as well as of the three states who were only expressed as beneficiaries thereof.

(4) In the column of figures, “m” signifies a million.

[illegible]

Peace-Indemnity	Cessions-Leases	Compensation	Delimitation	Frontier matters	Official intercourse	Commerce-Navigation	Tariff	Judicial procedure	Customs matters	Postal matters	Religious toleration	Opium trade	Emigration	River conservancy	Telegraphic Junction	Railway construction	Mining concessions	Railway loans	Public loans	Miscellaneous															
1891	1897 1898 June July	1897	1897		1897	1897 1898 Aug.		1898 June							1896 1897 (With Denmark)	1898 May June Oct. 1899 Jan. June 1899 May 1900 1901 1902	1898 May June Oct. 1899 Jan. June 1899 May 1900 1901 1902	1898 May June Oct. 1899 Jan. June 1899 May 1900 1901 1902	1895 Jan. £3 m. June £1 m. 1896 £16 m. (with Germany) 1898 £16 m. (with Germany) 1900 £210,000 1901 £48,000 1903 £2,900,000 1905 May £700,000 Sept. £1,100,000 1907 £1½ m. 1908 £5 m. (with Germany) 1908 Jan. 1908 £1½ m. 1908 £5 m. (with France) 1910 £3 m. (with Germany) 1910 £450,000 1911 (£1 of £6 m.) 1912 £5 m. 1913 (1/5 of £25 m.) 1914 £216,000	1895 Jan. £3 m. June £1 m. 1896 £16 m. (with Germany) 1898 £16 m. (with Germany) 1900 £210,000 1901 £48,000 1903 £2,900,000 1905 May £700,000 Sept. £1,100,000 1907 £1½ m. 1908 £5 m. (with Germany) 1908 Jan. 1908 £1½ m. 1908 £5 m. (with France) 1910 £3 m. (with Germany) 1910 £450,000 1911 (£1 of £6 m.) 1912 £5 m. 1913 (1/5 of £25 m.) 1914 £216,000	1891 1897 1898 Aug.	1901 1901 1902 Aug. Sept.	1898 June	1902 1902	1902 1902	1904	1905	1901	1905 (with Denmark) 1905 Apr. May	1905 (with Germany) 1905 Apr. May	1908 Apr. May	1908 Jan. 1908 1908 (with France) (with Germany) 1910 1911 1913 1914 Mar. July Aug.	1908 Apr.	1901 1901 1902 Apr. Sept. 1906 (Tibet)	

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Friendship	Peace-Indemnity	Leases	Compensation	Official Intercourse	Commerce-Navigation	Tariff	Judicial procedure	Customs matters	Postal matters	Religious toleration	Opium trade	River conservancy	Telegraphic junction	Railway construction	Mining concessions	Railway loans	Public loans	Miscellaneous	
BELGIUM	1845			1845	1845	1845	1865	1865	1865	1865		1901		1898		(With France) { 1898 £4½ m. 1904 £1 m. 1907 £640,000 1912 £10 m. 1912 £1½ m.		1865	Total = 10
	1865			1865	1865	1865	1865	1865	1865	1865		1901		1904				1901	
	1901	1901	{ Tls. 8,484,345 @ 3.75 = Fcs. 31,816,293.75	1901	1901	1901	1901	1902					1905						
SWEDEN	1847	1901	{ 1901 Tls. 62,820 @ 3/- = £9,423	1847	1847	1847	1847	1847	1847	1847								1847	Total = 4
		1901																1908	
					1908	1908	1908	1908	1908	1908	1908								
GERMANY	1861		1898	1861	1861	1876	1861	1861	1861	1861				1898	1898	{ 1899 With England 1895 £1 m. 1896 £16 m. 1898 £16 m. 1905 £1 m.		1861	Total = 17
				1880										1899				1901	
				1900	1905	1905	1905	1905	1905	1905	1905	1905	1905	1905	1905		1905	1905	
	1901	1901	{ 1901 Tls. 90,070,515 @ 3.00 = Mkcs. 275,165,423.32	1901	1901	1901	1901	1901	1901	1901			1907 May	1905 Jan.	1907	{ 1908 £5 m. 1910 £3 m. 1911 (1 of £6 m.) 1911 (1 of £10 m.) 1913 (1 of £25 m.)			Total = 17
				1904	1905		1900	1905	1905	1905	1905	1905	1905	1905	1905		1905	1905	

D	ITY	ION	ON	SE	ON	Compensation	Official intercourse	Commerce- Navigation	Tariff	Judicial procedure	Customs matters	Postal matters	Religious toleration	Opium trade	River conservancy	Telegraphic junction	Arbitration	Railway construction	Mining concessions	Miscellaneous	
NETHERLANDS	1863 (Oct.) 1901	1901	1901	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863
DENMARK	1863 (July)	1901	1901	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863	1863
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Total = 6

1911 (Consular)

1915

Total = 15

1883
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1896
1897
1899 Jan.
1899 Mar.
1900
1901
1902 Mar.
(with Russia)
1902 Oct.
1905

(with England)

Total = 8, including
four unratified

NETHERLANDS

DENMARK

PORTUGAL

Tls. 782,100 @ 1.796
= Fl. 1,404,651.60

1901 1901
Portion of
Tls. 149,670 @ 3/-
= £22,450.10/-

1901 1901
Tls. 92,250 @ 3/-
= £13,837.10/-

Reclamations
Internationales.

1863
(July)U 1862
1887

Friendship	Peace-Indemnity	Compensation	Official intercourse	Commerce-Navigation	Tariff	Judicial procedure	Customs matters	Postal matters	Religious toleration	Emigration	River conservancy	Public loans	Miscellaneous
1864			1864	1864	1864	1864	1864	1864	1864	1864			1864
1901	1901	1901	1901	1901	1901	1903				1877	1901		1901
	Tls. 135,315 @ 3.75 = Frs. 507,431.25												Total = 5
1866			1866	1866	1866	1866	1866	1866	1866				1866
1901	1901	1901	1901	1901	1901	1903					1901		1901
	Tls. 26,617.005 @ 3.75 = Lire 99,813,768.75										1905		Total = 4
1869			1869	1869	1869	1869	1869	1869	1869				1869
1901	1901	1901	1901	1901	1901	1902					1901		1901
	Tls. 4,003,920 @ 3.595 = Kr. 14,394,092.40										1905	1912 £750,000 1913 Mar. £300,000 Apr. £3,200,000	Total = 9

Total = 37.

(IX) JAPAN

Friendship	Peace-Indemnity	Cessions-Leases	Compensation	Delimitation	Frontier matters	Official intercourse	Commerce-Navigation	Tariff	Judicial procedure	Customs matters	Postal matters	River conservancy	Telegraphic junction	Forestry	Railway construction	Mining concessions	Railway loans	Public loans	Miscellaneous
1871			1874			1871	1871	1875	1871	1871	1871								1871 1874
1895	1895 Apr. Nov.	1895		1895			1895												1885 (Korea) 1895 Mar. Apr. Nov. (Liaotung)
1901	1901		1901			1896	1896 July Oct.	1896	1896	1896	1896								1896 Oct. 1898 1901
						1901	1901	1901	1901			1901							1903
							1903	1903	1903			1905 Sept.			1905				1905 (Manchuria)
							1905						1906				1907 £77,500		
										1907 May			1908 Oct. Nov.	1908 May Sept.	1907 Apr.		1908 £32,000 and £215,000		
				1909	1909	1909	1909	1909	1909				1909		1909				1909
				1910							1910						1910 £220,000		
																	1911 £1 m.		
																	1912 £½ m.		
																	1913 (½ of £25 m.)		

Tls. 34,793,100 @ 1.407
= Y. 48,953,891.70

X

	CHILE	MEXICO	BRAZIL	PERU	
	1915	1899	1881	1874	Friendship
		1911 } 1912 }			Compensation
	1915	1899	1881	1874	Official intercourse
		Mex. \$3,100,000	1881	1874	Commer- Navigation
			1881	1874	Tariff
			1881	1874	Judicial procedure
				1874	Religious toleration
			1881		Opium trade
		1899		1874	Emigration
			1909	1909 Aug. 28	Arbitration
	Total = 1	Total = 3	Total = 2	Total = 4	Miscellaneous

APPENDIX B.

NEW TREATIES AND NOTES BETWEEN CHINA AND JAPAN¹

*(Signed, Peking, May 25, 1915; ratifications exchanged,
Tokyo, June 8, 1915)*

(A) TREATY RESPECTING THE PROVINCE OF SHANTUNG

Article I.

The Chinese Government agrees to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung.

Article II.

The Chinese Government agrees that as regards the railway to be built by China herself from Chefoo or Lungkow to connect with the Kiaochow-Tsinanfu railway, if Germany abandons the privilege of financing the Chefoo-Weihsien line, China will approach Japanese capitalists to negotiate for a loan.

Article III.

The Chinese Government agrees, in the interest of trade and for the residence of foreigners, to open by China herself, as soon as possible, certain suitable places in the Province of Shantung as Commercial Ports.

Article IV.

The present treaty shall come into force on the day of its signature.

¹ China's Official History of the Recent Sino-Japanese Treaties, 1915, 43-63.

The present treaty shall be ratified by His Excellency the President of the Republic of China and His Majesty the Emperor of Japan, and the ratification thereof shall be exchanged at Tokyo as soon as possible.

In witness whereof the respective Plenipotentiaries of the High Contracting Parties have signed and sealed the present Treaty, two copies in the Chinese language and two in Japanese, etc., etc.,

LOU TSENG-TSIANG (Minister of Foreign Affairs)
HIOKI EKI (Japanese Minister)

EXCHANGE OF NOTES

I. Respecting Shantung

(From Mr. Lou to Dr. Hioki)

Monsieur le Ministre—

In the name of the Chinese Government I have the honour to make the following declaration to your Government:—

Within the Province of Shantung or along its coast no territory or island will be leased or ceded to any foreign Power under any pretext.

II. Respecting the Opening of Ports

(From Mr. Lou to Dr. Hioki)

I have the honour to state that the places which ought to be opened as Commercial Ports by China herself, as provided in Article 3 of the Treaty respecting the Province of Shantung signed this day, will be selected, and the regulations therefor will be drawn up, by the Chinese Government itself, a decision concerning which will be made after consulting the Minister of Japan.

III. Respecting the Restoration of Kiaochow Bay

(From Dr. Hioki to Mr. Lou)

Excellency—

In the name of my Government I have the honour to make the following declaration to the Chinese Government.

When, after the termination of the present war, the leased territory of Kiaochow Bay is completely left to the free disposal of Japan, the Japanese Government will restore the said leased Territory to China under the following conditions:—

1. The whole of Kiaochow Bay to be opened as a Commercial Port.
2. A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese Government.
3. If the foreign Powers desire it, an international concession may be established.
4. As regards the disposal to be made of the buildings and properties of Germany and the conditions and procedure relating thereto, the Japanese Government and the Chinese Government shall arrange the matter by mutual agreement before the restoration.

(B) TREATY RESPECTING SOUTH MANCHURIA AND
EASTERN INNER MONGOLIA

Article I.

The two High Contracting Parties agree that the term of lease of Port Arthur and Dalny and the terms of the South Manchurian Railway and the Antung-Mukden Railway, shall be extended to 99 years.

Article II.

Japanese subjects in South Manchuria may, by negotiation, lease land necessary for erecting suitable buildings for trade and manufacture or for prosecuting agricultural enterprises.

Article III.

Japanese subjects shall be free to reside and travel in South Manchuria and to engage in business and manufacture of any kind whatsoever.

Article IV.

In the event of Japanese and Chinese desiring jointly to undertake agricultural enterprises and industries incidental thereto, the Chinese Government may give its permission.

Article V.

The Japanese subjects referred to in the preceding three articles, besides being required to register with the local Authorities passports which they must procure under the existing regulations, shall also submit to the police laws and ordinances and taxation of China.

Civil and criminal cases in which the defendants are Japanese shall be tried and adjudicated by the Japanese Consul; those in which the defendants are Chinese shall be tried and adjudicated by Chinese Authorities. In either case an officer may be deputed to the court to attend the proceedings. But mixed civil cases between Chinese and Japanese relating to land shall be tried and adjudicated by delegates of both nations conjointly in accordance with Chinese law and local usage.

When, in future, the judicial system in the said region is completely reformed, all civil and criminal cases concerning Japanese subjects shall be tried and adjudicated entirely by Chinese law courts.

Article VI.

The Chinese Government agrees, in the interest of trade and for the residence of foreigners, to open by China herself, as soon as possible, certain suitable places in Eastern Inner Mongolia as Commercial Ports.

Article VII.

The Chinese Government agrees speedily to make a fundamental revision of the Kirin-Changchun Railway Loan-Agreement, taking as a standard the provisions in railway agreements made heretofore between China and foreign financiers.

When, in future, more advantageous terms than those in existing railway loan agreements are granted to foreign financiers in connection with railway loans, the above agreement shall again be revised in accordance with Japan's wishes.

Article VIII.

All existing treaties between China and Japan relating to Manchuria shall, except where otherwise provided for by this Treaty, remain in force.

Article IX.

The present Treaty shall come into force on the date of its signature. The present Treaty shall be ratified, etc.

In witness whereof, etc.

LOU TSENG-TSIANG (Minister of Foreign Affairs)

HIOKI EKI (Japanese Minister)

EXCHANGE OF NOTES**I. Respecting the Lease of Port Arthur, etc.**

(From Mr. Lou to Dr. Hioki)

I have the honour to state that, respecting the provisions contained in Article 1 of the Treaty relating to South Manchuria and Eastern Inner Mongolia, signed this day, the term of lease of Port Arthur and Dalny shall expire in the 86th year of the Republic or 1997. The date for restoring the South Manchurian Railway to China shall fall due in the 91st year of the Republic or 2002. Article 21 in the original South Manchurian Railway Agreement, providing that it may be redeemed by China after 36 years from the date on which the traffic is opened, is hereby cancelled. The term of the Antung-Mukden Railway shall expire in the 96th year of the Republic or 2007.

II. Respecting the Opening of Ports

(From Mr. Lou to Dr. Hioki)

I have the honour to state that the places which ought to be opened as Commercial Ports by China herself, as provided in Article 6 of the Treaty respecting South Manchuria and Eastern Inner Mongolia signed this day, will be selected, and the regulations therefor will be drawn up, by the Chinese Government itself, a decision concerning which will be made after consulting the Minister of Japan.

III. Respecting Mining Areas

(From Mr. Lou to Dr. Hioki)

I have the honour to state that Japanese subjects shall, as soon as possible, investigate and select mines in the mining areas in South Manchuria specified hereinunder, except those being prospected for or worked, and the Chinese Government will then permit them to prospect or work the same; but before the Mining regulations are definitely settled, the practice at present in force shall be followed.

Fengtien:—

LOCALITY	DISTRICT	MINERAL
Niu Hsin T'ai	Pen-hsi	Coal
Tien Shih Fu Kou	"	"
Sha Kung Kang	Hai-lung	"
T'ieh Ch'ang	Tung-hua	"
Nuan Ti T'ang	Chin	"
An Shan Chan region	From Liaoyang to Pen-hsi	Iron

Kirin (Southern portion) :—

Sha Sung Kang	Ho-lung	Coal & Iron
Kang Yao	Chi-lin (Kirin)	Coal
Chia P'i Kou	Hua-tien	Gold

IV. Respecting Railways and Taxes

(From Mr. Lou to Dr. Hioki)

In the name of my Government I have the honour to make the following declaration to your Government:—

China will hereafter provide funds for building necessary railways in South Manchuria and Eastern Inner Mongolia; if foreign capital is required China may negotiate for a loan with Japanese capitalists first: and further, the Chinese Government, when making a loan in future on the security of the taxes in the above-mentioned places (excluding the salt and customs revenue which have already been pledged by the Chinese Central Government), may negotiate for it with Japanese capitalists first.

V. Respecting the Employment of Advisers

(From Mr. Lou to Dr. Hioki)

In the name of the Chinese Government I have the honour to make the following declaration to your Government:—

Hereafter, if foreign advisers or instructors on political, financial, military, or police matters are to be employed in South Manchuria, Japanese may be employed first.

VI. Respecting "Lease by Negotiation"

(From Dr. Hioki to Mr. Lou)

Excellency—

I have the honour to state that the term "lease by negotiation," contained in Article 2 of the Treaty respecting South Manchuria and Eastern Inner Mongolia signed this day, shall be understood to imply a long-term lease of not more than thirty years and also the possibility of its unconditional renewal.

VII. Respecting Police Laws and Ordinances and Taxation

(From Mr. Lou to Dr. Hioki)

I have the honour to state that the Chinese Authorities will notify the Japanese Consul of the Police laws and ordinances and the taxation to which Japanese subjects shall submit, according to Article 5

of the Treaty respecting South Manchuria and Eastern Inner Mongolia signed this day, so as to come to an understanding with him before their enforcement.

VIII. Respecting the Postponement of Articles 2, 3, 4 and 5

(From Mr. Lou to Dr. Hioki)

I have the honour to state that, inasmuch as preparations have to be made regarding Articles 2, 3, 4 and 5 of the Treaty respecting South Manchuria and Eastern Inner Mongolia signed this day, the Chinese Government proposes that the operation of the said Articles be postponed for a period of three months beginning from the date of the signing of the said Treaty.

I hope your Government will agree to this proposal.

IX. Respecting the Han-yeh-ping Company

(From Mr. Lou to Dr. Hioki)

I have the honour to state that, if in future the Hanyehping Company and the Japanese capitalists agree upon co-operation, the Chinese Government, in view of the intimate relations subsisting between the Japanese capitalists and the said Company, will forthwith give its permission. The Chinese Government further agree not to confiscate the said Company, nor without the consent of the Japanese capitalists to convert it into a state enterprise, nor cause it to borrow and use foreign capital other than Japanese.

X. Respecting the Fukien Question

(From Mr. Lou to Dr. Hioki)

I have the honour to acknowledge the receipt of your Excellency's note of this day's date, which I have noted.

In reply I beg to inform you that the Chinese Government hereby declares that it has given no permission to foreign nations to construct, on the coast of Fukien Province, dockyards, coaling stations for military use, naval bases, or to set up other military establishments; nor does it entertain an intention of borrowing foreign capital for the purpose of setting up the above-mentioned establishments.

APPENDIX C.

ARBITRATION CONVENTION BETWEEN CHINA AND HOLLAND ¹

*(Signed, The Hague, June 1, 1915; ratifications exchanged,
Peking, April 20, 1916)*

LE PRÉSIDENT DE LA RÉPUBLIQUE DE CHINE et SA MAJESTÉ LA REINE DES PAYS-BAS, s'inspirant des principes de la Convention pour le règlement pacifique des conflits internationaux conclue à La Haye le 18 octobre 1907 et désirant consacrer notamment le principe de l'arbitrage obligatoire dans leurs rapports réciproques par un accord général de la nature visée à l'article 40 de la dite Convention, ont résolu de conclure un Traité à cet effet et ont nommé pour Leurs Plénipotentiaires, savoir:

LE PRÉSIDENT DE LA RÉPUBLIQUE DE CHINE: Son Excellence Monsieur TANG TSAI-FOU, Envoyé Extraordinaire et Ministre Plénipotentiaire de la République près Sa Majesté la Reine des Pays-Bas;

SA MAJESTÉ LA REINE DES PAYS-BAS: Son Excellence le Jonkheer J. LOUDON, Son Ministre des Affaires Étrangères.

Lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

Article I.

Les Hautes Parties Contractantes s'engagent à soumettre à la Cour Permanente d'Arbitrage tous les différends qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par la voie diplomatique et cela même dans le cas où ces différends auraient leur origine dans des faits antérieurs à la conclusion de la présente Convention.

¹ Dutch official Staatsblad, 1916, No. 181.

Article II.

En chaque cas particulier les Hautes Parties Contractantes signent un compromis spécial déterminant nettement l'objet du litige, l'étendue des pouvoirs du tribunal arbitral, composé d'un ou de plusieurs arbitres, le mode de sa désignation, son siège, la langue dont il fera usage et celles dont l'emploi sera autorisé devant lui, le montant de la somme que chacune des Hautes Parties aura à déposer à titre d'avance les frais, ainsi que les règles à observer en ce qui concerne les formalités et les délais de la procédure et, généralement, toutes conditions dont Elles seront convenues.

Article III.

Si les Parties ne réussissent pas à se mettre d'accord à ce sujet, même une seule des deux pourra adresser à la Cour Permanente d'Arbitrage la requête d'établir le compromis.

Dans ce cas le compromis sera établi par une commission composée de cinq membres, désignés de la manière prévue à l'article 45, alinéas 3, 4, 5 et 6 de la Convention de La Haye pour le règlement pacifique des conflits internationaux du 18 octobre 1907.

Le cinquième membre est de droit Président de la commission.

Cette commission fonctionnera elle-même comme tribunal d'arbitrage.

Article IV.

Si un accord ne peut s'établir aux effets de l'article précédent, alinéa 2, la désignation d'un tribunal arbitral sera déférée, sur requête des deux Parties ou de l'une d'Elles, au Président des Etats-Unis d'Amérique. Si telle requête émane des deux Parties, elles peuvent demander la désignation d'un arbitre unique; mais si elle émane de l'une d'Elles seulement le tribunal sera composé de cinq membres.

Le choix des arbitres sera fait sur la liste des membres de la Cour Permanente d'Arbitrage, mais non parmi ceux qui ont été désignés par les deux Parties elles-mêmes ou qui sont des nationaux de l'une d'Elles.

Le tribunal jugera sur la base des prétentions qui lui auront été soumises.

Article V.

Une demande de revision de la sentence arbitrale sera admise conformément aux dispositions de l'article 83, alinéas 2 et 3 de la Convention de La Haye pour le règlement pacifique des conflits

internationaux du 18 octobre 1907, dans le délai qui sera fixé par le tribunal ou par l'arbitre.

Article VI.

Dans les questions qui selon les lois territoriales sont du ressort des autorités judiciaires nationales, les Parties Contractantes ne seront pas tenues de soumettre le différend au jugement arbitral, avant que la juridiction nationale compétente se soit prononcée définitivement, sauf le cas de déni de justice.

Article VII.

Sauf les dispositions ci-dessus indiquées la procédure arbitrale sera réglée par les dispositions établies par la Convention de La Haye pour le règlement pacifique des conflits internationaux de 18 octobre 1907.

Article VIII.

Le présent traité sera ratifié dans le plus bref délai possible et les actes de ratification seront échangés à Pékin.

Il aura une durée de dix ans à partir de l'échange des ratifications.

S'il n'est dénoncé six mois avant son échéance, il sera censé être renouvelé pour une nouvelle période de dix ans et ainsi de suite.

Fait à La Haye en double exemplaire, le 1er Juin 1915 (le 1er jour du 6 mois de la 4ème année de la République de Chine).

JONKHEER J. LOUDON
TANG TSAI-FOU

APPENDIX D.

TREATY BETWEEN CHINA AND THE UNITED STATES FOR THE ADVANCEMENT OF PEACE¹

*(Signed at Washington, September 15, 1914; ratifications
exchanged, October 22, 1915)*

The President of the United States of America and the President of the Republic of China, desiring to strengthen the friendly relations which unite their two countries and to serve the cause of general peace, have decided to conclude a treaty for these purposes and have consequently appointed the plenipotentiaries designated hereinafter, to wit:

The President of the United States of America, the Honorable William Jennings Bryan, Secretary of State of the United States; and

The President of the Republic of China, Kai Fu Shah, Envoy Extraordinary and Minister Plenipotentiary of the Republic of China to the United States;

Who, after exhibiting to each other their full powers, found to be in due and proper form, have agreed upon the following articles:

Article I.

Any disputes arising between the Government of the United States of America and the Government of the Republic of China, of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the high contracting parties do not have recourse to arbitration, be submitted for investigation and report to a permanent international commission constituted in the manner prescribed in the following article.

The high contracting parties agree not to resort, with respect to each other, to any act of force during the investigation to be made by the commission and before its report is handed in.

¹ United States Treaty Series, No. 619.

Article II.

The international commission shall be composed of five members appointed as follows: each government shall designate two members, only one of whom shall be of its own nationality; the fifth member shall be designated by common consent and shall not belong to any of the nationalities already represented on the commission; he shall perform the duties of president.

In case the two governments should be unable to agree on the choice of the fifth commissioner, the other four shall be called upon to designate him, and failing an understanding between them, the provisions of Article 45 of the Hague Convention of 1907 shall be applied.

The commission shall be organized within six months from the exchange of ratification of the present convention.¹

The members shall be appointed for one year and their appointment may be renewed. They shall remain in office until superseded or reappointed, or until the work on which they are engaged at the time their office expires is completed.

Any vacancies which may arise (from death, resignation, or cases of physical or moral incapacity) shall be filled within the shortest possible period in the manner followed for the original appointment.

The high contracting parties shall, before designating the commissioners, reach an understanding in regard to their compensation. They shall bear by halves the expenses incident to the meeting of the Commission.

Article III.

In case a dispute should arise between the high contracting parties which is not settled by the ordinary methods, each party shall have a right to ask that the investigation thereof be intrusted to the international commission charged with making a report. Notice shall be given to the President of the international commission, who shall at once communicate with his colleagues.

In the same case the president may, after consulting his colleagues and upon receiving the consent of a majority of the members of the commission, offer the services of the latter to each of the contracting parties. Acceptance of the offer declared by one of the two governments shall be sufficient to give jurisdiction of the case to the commission in accordance with the foregoing paragraph.

¹ The time within which the organisation of the commission may be completed was extended by an exchange of notes of May 11-19, 1916, from April 22, 1916, to August 1, 1916. (U. S. Treaty Series, No. 619-A.)

The place of meeting shall be determined by the commission itself.

Article IV.

The two high contracting parties shall have a right, each on its own part, to state to the president of the commission what is the subject matter of the controversy. No difference in these statements, which shall be furnished by way of suggestion, shall arrest the action of the commission.

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.

Article V.

As regards the procedure which it is to follow, the commission shall as far as possible be guided by the provisions contained in Articles 9 to 36 of Convention I of The Hague of 1907.

The high contracting parties agree to afford the commission all means and all necessary facilities for its investigation and report.

The work of the commission shall be completed within one year from the date on which it has taken jurisdiction of the case, unless the high contracting parties should agree to set a different period.

The conclusion of the commission and the terms of its report shall be adopted by a majority. The report, signed only by the president acting by virtue of his office, shall be transmitted by him to each of the contracting parties.

The high contracting parties reserve full liberty as to the action to be taken on the report of the commission.

Article VI.

The present treaty shall be ratified by the President of the United States of America, with the advice and consent of the Senate of the United States, and by the President of the Republic of China.

It shall go into force immediately after the exchange of ratifications and shall last five years.

Unless denounced six months at least before the expiration of the said period of five years, it shall remain in force until the expiration of a period of twelve months after either party shall have notified the other of its intention to terminate it.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.

Done at Washington this 15th day of September, in the year nineteen hundred and fourteen, corresponding to the 15th day of the ninth month in the third year of the Republic of China.

WILLIAM JENNINGS BRYAN

KAI-FU SHAH

APPENDIX E.

AGREEMENT BETWEEN CHINA, RUSSIA, AND MONGOLIA ¹

(Signed at Kiachta, May 25/ June 7, 1915)

The President of the Republic of China,

His Imperial Majesty, the Emperor of all the Russias, and

His Holiness the Bogdo (Great) Cheptsun (Venerable) Damba (Sacred) Hut'ukht'u (Reincarnated) Khan (Ruler) of Outer Mongolia,

Animated by a sincere desire to settle by mutual agreement various questions created by a new state of things in Outer Mongolia, have named for that purpose their plenipotentiary delegates, that is to say:

The President of the Republic of China, General Pi Kuei-fang and Monsieur Ch'ên Lu, Envoy Extraordinary and Minister Plenipotentiary of China to Mexico;

His Imperial Majesty the Emperor of all the Russias, His Councillor of State Alexandre Miller, Diplomatic Agent and Consul-General in Mongolia; and

His Holiness the Bogdo Cheptsun Damba Hut'ukht'u Kahn of Outer Mongolia, E'êrh-tê-ni Cho-nang Pei-tzu Sê-lêng-tan, Vice-Chief of Justice, and T'uhsieh-t'u Ch'in Wang Ch'a-K'o-tu-êrh-cha-pu, Chief of Finance.

Who having verified their respective full powers found in good and due form, have agreed upon the following:

Article I.

Outer Mongolia recognizes the Sino-Russian Declaration and the Notes exchanged between China and Russia of the 5th day of the 11th month of the 2nd year of the Republic of China (23 October/5 November, 1913).²

¹ 10 Am. J. Int. Law (October, 1916), Supplement, 251-258.

² See *infra*, 253 *sqq.*

Article II.

Outer Mongolia recognizes China's suzerainty. China and Russia recognize the autonomy of Outer Mongolia forming part of Chinese territory.

Article III.

Autonomous Mongolia has no right to conclude international treaties with foreign Powers respecting political and territorial questions. As respects questions of a political and territorial nature in Outer Mongolia, the Chinese Government engages to conform to Article II of the notes exchanged between China and Russia on 23 October/5 November, 1913.

Article IV.

The title "Bogdo Cheptsun Damba Hut'ukht'u Kahn of Outer Mongolia" is conferred by the President of the Republic of China. The calendar of the Republic as well as the Mongol calendar of cyclical signs are to be used in official documents.

Article V.

China and Russia, conformably to Articles II and III of the Sino-Russian Declaration of 23 October/5 November, 1913, recognize the exclusive right of the Autonomous Government of Outer Mongolia to attend to all the affairs of its internal administration and to conclude with foreign Powers international treaties and agreements respecting all questions of a commercial and industrial nature concerning autonomous Mongolia.

Article VI.

Conformably to the same Article III of the Declaration, China and Russia engage not to interfere in the system of autonomous internal administration existing in Outer Mongolia.

Article VII.

The military escort of the Chinese Dignitary at Urga provided for by Article III of the above-mentioned Declaration is not to exceed two hundred men. The military escorts of his assistants at Uliassutai, at Kobdo and at Mongolian-Kiachta are not to exceed fifty men each. If, by agreement with the Autonomous Government of Outer Mongolia, assistants of the Chinese Dignitary are appointed in other localities of Outer Mongolia, their military escorts are not to exceed fifty men each.

Article VIII.

The Imperial Government of Russia is not to send more than one hundred and fifty men as consular guard for its representative at Urga. The military escorts of the Imperial consulates and vice-

consulates of Russia, which have already been established or which may be established by agreement with the Autonomous Government of Outer Mongolia, in other localities of Outer Mongolia, are not to exceed fifty men each.

Article IX.

On all ceremonial or official occasions the first place of honor is due to the Chinese Dignitary. He has the right, if necessary, to present himself in private audience with His Holiness Bogdo Cheptsun Damba Hut'ukht'u Kahn of Outer Mongolia. The Imperial representative of Russia enjoys the same right of private audience.

Article X.

The Chinese Dignitary at Urga and his assistants in the different localities of Outer Mongolia provided for by Article VII of this agreement are to exercise general control, lest the acts of the Autonomous Government of Outer Mongolia and its subordinate authorities may impair the suzerain rights and the interests of China and her subjects in Autonomous Mongolia.

Article XI.

Conformably to Article IV of the Notes exchanged between China and Russia on 23 October/5 November, 1913, the territory of Autonomous Outer Mongolia comprises the regions which were under the jurisdiction of the Chinese Amban at Urga, of the Tartar-General at Uliassutai and of the Chinese Amban at Kobdo; and connects with the boundary of China by the limits of the banners of the four aimaks of Khalka and of the district of Kobdo, bounded by the district of Houlon-Bouire on the east, by Inner Mongolia on the south, by the Province of Sinkiang on the south-west, and by the districts of Altai on the west.

The formal delimitation between China and Autonomous Mongolia is to be carried out by a special commission of delegates of China, Russia, and Autonomous Outer Mongolia, which shall set itself to the work of delimitation within a period of two years from the date of signature of the present agreement.

Article XII.

It is understood that customs duties are not to be established for goods of whatever origin they may be, imported by Chinese merchants into Autonomous Outer Mongolia. Nevertheless, Chinese merchants shall pay all the taxes on internal trade which have been established in Autonomous Outer Mongolia and which may be established therein in the future, payable by the Mongols of autonomous Outer Mongolia. Similarly the merchants of Autonomous Outer Mongolia, when importing any kind of goods of local production into Inner China,

shall pay all the taxes on trade which have been established in Inner China and which may be established therein in the future, payable by Chinese merchants. Goods of foreign origin imported from Autonomous Outer Mongolia into Inner China shall be subject to the customs duties stipulated in the regulations for land trade of 1881.

Article XIII.

Civil and criminal actions arising between Chinese subjects residing in Autonomous Outer Mongolia are to be examined and adjudicated by the Chinese Dignitary at Urga and by his assistants in the other localities of Autonomous Outer Mongolia.

Article XIV.

Civil and criminal actions arising between Mongols of Autonomous Outer Mongolia and Chinese subjects residing therein are to be examined and adjudicated conjointly by the Chinese Dignitary at Urga and his assistants in the other localities of Autonomous Outer Mongolia, or their delegates, and the Mongolian authorities. If the defendant or the accused is a Chinese subject and the claimant or the complainant is a Mongol of Autonomous Outer Mongolia, the joint examination and decision of the case are to be held at the Chinese Dignitary's place at Urga and at that of his assistants in the other localities of Autonomous Outer Mongolia; if the defendant or the accused is a Mongol of Autonomous Outer Mongolia and the claimant or the complainant is a Chinese subject, the case is to be examined and decided in the same manner in the Mongolian yamen. The guilty are to be punished according to their own laws. The interested parties are free to arrange their disputes amicably by means of arbiters chosen by themselves.

Article XV.

Civil and criminal actions arising between Mongols of Autonomous Outer Mongolia and Russian subjects residing therein are to be examined and decided conformably to the stipulations of Article XVI of the Russo-Mongolian Protocol of 21 October/3 November, 1912.¹

Article XVI.

All civil and criminal actions arising between Chinese and Russian subjects in Autonomous Outer Mongolia are to be examined and decided in the following manner; in an action wherein the claimant or the complainant is a Russian subject and the defendant or accused is a Chinese subject, the Russian Consul personally or through his delegate participates in the judicial trial, enjoying the same rights as the Chinese Dignitary at Urga or his delegate or his assistants in

¹ See *infra*, 247 sqq.

the other localities of Autonomous Outer Mongolia. The Russian Consul or his delegate proceeds to the hearing of the claimant and the Russian witnesses in the court in session, and interrogates the defendant and the Chinese witnesses through the medium of the Chinese Dignitary at Urga or his delegate or of his assistants in the other localities of Autonomous Outer Mongolia; the Russian Consul or his delegate examines the evidence presented, demands security for "revindications" and has recourse to the opinion of experts, if he considers such expert opinion necessary for the elucidation of the rights of the parties, etc.; he takes part in deciding and in the drafting of the judgment, which he signs with the Chinese Dignitary at Urga or his delegate or his assistants in the other localities of Autonomous Outer Mongolia. The execution of the judgment constitutes a duty of the Chinese authorities.

The Chinese Dignitary at Urga and his assistants in the other localities of Autonomous Outer Mongolia may likewise personally or through their delegates be present at the hearing of an action in the consulates of Russia wherein the defendant or the accused is a Russian subject and the claimant or the complainant is a Chinese subject. The execution of the judgment constitutes a duty of the Russian authorities.

Article XVII.

Since a section of the Kiachta-Urga-Kalgan telegraph line lies in the territory of Autonomous Outer Mongolia, it is agreed that the said section of the said telegraph line constitutes the complete property of the Autonomous Government of Outer Mongolia.

The details respecting the establishment on the borders of that country and Inner Mongolia of a station to be administered by Chinese and Mongolian employees for the transmission of telegrams, as well as the questions of the tariff for telegrams transmitted and of the apportionment of the receipts, etc., are to be examined and settled by a special commission of technical delegates of China, Russia and Autonomous Outer Mongolia.

Article XVIII.

The Chinese postal institutions at Urga and Mongolian-Kiachta remain in force on the old basis.

Article XIX.

The Autonomous Government of Outer Mongolia will place at the disposal of the Chinese Dignitary at Urga and of his assistants at Uliassutai, Kobdo and Mongolian-Kiachta, as well as of their staff, the necessary houses, which are to constitute the complete property of the Government of the Republic of China. Similarly necessary

grounds in the vicinity of the residence of the said staff are to be granted for their escorts.

Article XX.

The Chinese Dignitary at Urga and his assistants in the other localities of Autonomous Outer Mongolia and also their staffs are to enjoy the right to use the courier stations of the Autonomous Mongolian Government conformably to the stipulations of Article XI of the Russo-Mongolian Protocol of 21 October/3 November, 1912.

Article XXI.

The stipulations of the Sino-Russian Declaration and the Notes exchanged between China and Russia of 23 October/5 November, 1913, as well as those of the Russo-Mongolian Protocol of the 21 October/3 November, 1912, remain in full force.

Article XXII.

The present agreement drawn up in triplicate in Chinese, Russian, Mongolian and French, comes into force from the day of its signature. Of the four texts which have been duly compared and found to agree, the French text shall be authoritative in the interpretation of the present agreement.

Done at Kiachta the 7th day of the sixth month of the fourth year of the Republic of China, corresponding to the twenty-fifth of May (seventh of June), one thousand nine hundred fifteen.

DECLARATIONS BETWEEN RUSSIA AND CHINA

KIACHTA *May 25, 1915.*
June 7,

The undersigned Imperial Delegate Plenipotentiary of Russia to the tripartite negotiations at Kiachta, duly authorized for this purpose, has the honor, on proceeding to sign the tripartite agreement of this day's date relating to Autonomous Outer Mongolia, to declare in the name of his government to their Excellencies Messieurs Py Koue Fang and Tcheng Loh, Delegates Plenipotentiary of the Republic of China to the tripartite negotiations at Kiachta, as follows:

It is agreed that all the telegraph offices which are situated along that section of the Kalgan-Urga-Kiachta line which lies within Outer Mongolia and of which mention is made in Article XVII of the agreement of Kiachta, are to be handed over by the Chinese officials

to the Mongolian officials within a period at most of six months after the signing of the agreement; and that the point of junction of the Chinese and Mongolian lines is to be fixed by the technical commission provided for in the aforesaid article.

The above is at the same time brought to the knowledge of the Delegates Plenipotentiary of the Autonomous Government of Outer Mongolia.

The undersigned seizes this occasion to renew to the Delegates Plenipotentiary of the Republic of China the assurances of his very high consideration.

(Signed) A. MILLER.

To MM. General Py Koue Fang and Tcheng Loh,
Chinese Delegates Plenipotentiary.

KIACHTA, $\frac{\text{May } 25,}{\text{June } 7,}$ 1915.

The undersigned, Delegate Plenipotentiary of Russia to the tripartite negotiations at Kiachta, has the honor to acknowledge to their excellencies Messieurs Py Koue Fang and Tcheng Loh, Delegates Plenipotentiary of the Republic of China to the tripartite negotiations at Kiachta, the receipt of the following note of to-day's date:

“The undersigned Delegates Plenipotentiary of the Republic of China to the tripartite negotiations at Kiachta, duly authorized for this purpose, have the honor, on proceeding to sign the tripartite agreement of this day's date relating to Autonomous Outer Mongolia, to declare in the name of their government to his excellency, Mr. Miller, Imperial Delegate Plenipotentiary of Russia to the tripartite negotiations at Kiachta as follows: From the day of signature of the present Sino-Russo-Mongolian agreement the Government of the Republic of China grants a full amnesty to all the Mongols who submitted to the Autonomous Government of Outer Mongolia; it leaves to all the Mongols of Outer Mongolia as of Inner Mongolia the freedom as before of residence and travel in the said regions. The Government of the Republic of China will not place any restraint upon Mongols going in pilgrimage to testify their veneration to His Holiness Bôgdo Cheptsun Damba Hut'ukht'u Khan of Outer Mongolia.”

The undersigned seizes this occasion to renew to the Delegates Plenipotentiary of the Republic of China the assurances of his very high consideration.

(Signed) A. MILLER.

To MM. General Py Koue Fang and Tcheng Loh,
Chinese Delegates Plenipotentiary.

AGREEMENT BETWEEN MONGOLIA AND RUSSIA*(Signed at Urga, October 21/ November 3, 1912)¹*

In accordance with the desire unanimously expressed by the Mongolians to maintain the national and historic constitution of their country, the Chinese troops and authorities were obliged to evacuate Mongolian territory, and Djebzoun Damba-Khutukhta was proclaimed Ruler of the Mongolian people. The old relations between Mongolia and China thus came to an end.

At the present moment, taking into consideration the facts stated above, as well as the mutual friendship which has always existed between the Russian and Mongolian nations, and in view of the necessity of defining exactly the system regulating trade between Russia and Mongolia;

The Actual State Councillor Ivan Korostovetz, duly authorized for the purpose by the Imperial Russian Government; and

The Protector of the Ten Thousand Doctrines Sain-noin Khan Namnan-Souroun, President of the Council of Ministers of Mongolia;

The Plenipotentiary Tchinsouzkou Tzin-van Lama Tzerin-Tchimet, Minister of the Interior;

The Plenipotentiary Daitzin-van Handa-dorji, of the rank of Khan-erdeni, Minister for Foreign Affairs;

The Plenipotentiary Daitzin-van Handa-dorki, of the rank of Khan-erdeni, Minister for Foreign Affairs;

The Plenipotentiary Erdeni Dalai Tzun-van Gombo-Souroun, Minister of War;

The Plenipotentiary Touchetou Tzun-van Tchakdorjab, Minister of Finance; and

The Plenipotentiary Erdeni Tzum-van Namsarai, Minister of Justice;

Duly authorized by the Ruler of the Mongolian nation, by the Mongolian Government and by the ruling Princes, have agreed as follows:

Article I.

The Imperial Russian Government shall assist Mongolia to maintain the autonomous régime which she has established, as also the right to have her national army, and to admit neither the presence of Chinese troops on her territory nor the colonization of her land by the Chinese.

¹ British Parliamentary Paper, Cd. 6604

Article II.

The Ruler of Mongolia and the Mongolian Government shall grant, as in the past, to Russian subjects and trade the enjoyment in their possessions of the rights and privileges enumerated in the protocol annexed hereto.

It is well understood that there shall not be granted to other foreign subjects in Mongolia rights not enjoyed there by Russian subjects.

Article III.

If the Mongolian Government finds it necessary to conclude a separate treaty with China or another foreign Power, the new treaty shall in no case either infringe the clauses of the present agreement and of the protocol annexed thereto, or modify them without the consent of the Imperial Russian Government.

Article IV.

The present amicable agreement shall come into force from the date of its signature.

In witness whereof the respective plenipotentiaries, having compared the two texts, Russian and Mongolian, of the present agreement, made in duplicate, and having found the two texts to correspond, have signed them, have affixed thereto their seals, and have exchanged texts.

Done at Urga on the 21st October, 1912, corresponding to the 24th day of the last autumn month of the 2nd year of the reign of the Unanimously Proclaimed, according to the Mongolian calendar.

**PROTOCOL ANNEXED TO RUSSO-MONGOLIAN AGREEMENT
OF OCTOBER 21/ NOVEMBER 3, 1912**

(Signed at Urga, October 21/ November 3, 1912)

By virtue of the enactment of the second article of the agreement, signed on this day between Actual State Councillor, Ivan Korostovetz, Plenipotentiary of the Imperial Russian Government, and the President of the Council of Ministers of Mongolia, Sain-noin Khan Namnan-Souroun, the Protector of Ten Thousand Doctrines; the Plenipotentiary and Minister of the Interior, Tchin-souzouktou Tzin-van Lama Tzerin-Tchimet; the Plenipotentiary and Minister for Foreign Affairs, Daitzin-van Handa-dorji of the rank of Khan-erdeni; the Plenipotentiary and Minister of War, Erdenia Dalai Tzun-van Gombo-Souroun;

the Plenipotentiary and Minister of Finance, Touchetou Tzum-van Tchakdorjab; and the Plenipotentiary and Minister of Justice, Erdeni Tzun-van Namsarai, on the authority of the Ruler of Mongolia, the Mongolian Government, and the ruling Princes; the above-named plenipotentiaries have come to an agreement respecting the following articles, in which are set forth the rights and privileges of Russian subjects in Mongolia, some of which they already enjoy, and the rights and privileges of Mongolian subjects in Russia:

Article I.

Russian subjects, as formerly, shall enjoy the right to reside and move freely from one place to another throughout Mongolia; to engage there in any kind of commercial, industrial, and other business; and to enter into agreements of various kinds, whether with individuals, or firms, or institutions, official or private, Russian, Mongolian, Chinese, or foreign.

Article II.

Russian subjects, as formerly, shall enjoy the right at all times to import and export, without payment of import and export dues, every kind of product of the soil and industry of Russia, Mongolia and China, and other countries, and to trade freely in it without payment of any duties, taxes, or other dues.

The enactments of this (2nd) article shall not extend to combined Russo-Chinese undertakings, or to Russian subjects falsely declaring themselves to be owners of wares not their property.

Article III.

Russian credit institutions shall have the right to open branches in Mongolia, and to transact all kinds of financial and other business, whether with individuals, institutions, or companies.

Article IV.

Russian subjects may conclude purchases and sales in cash or by an exchange of wares (barter), and they may conclude agreements on credit. Neither "khoshuns" nor the Mongolian Treasury shall be held responsible for the debts of private individuals.

Article V.

The Mongolian authorities shall not preclude Mongolians or Chinese from completing any kind of commercial agreement with Russian subjects, from entering into their personal service, or into commercial and industrial undertakings formed by them. No rights

of monopoly as regards commerce or industry shall be granted to any official or private companies, institutions, or individuals in Mongolia. It is, of course, understood that companies and individuals who have already received such monopolies from the Mongolian Government previous to the conclusion of this agreement shall retain their rights and privileges until the expiry of the period fixed.

Article VI.

Russian subjects shall be everywhere granted the right, whether in towns or "khoshuns," to hold allotments on lease, or to acquire them as their own property for the purpose of organizing commercial industrial establishments, and also for the purpose of constructing houses, shops, and stores. In addition, Russian subjects shall have the right to lease vacant lands for cultivation. It is, of course, understood that these allotments shall be obtained and leased for the above-specified purposes, and not for speculative aims. These allotments shall be assigned by agreement with the Mongolian Government in accordance with existing laws of Mongolia, everywhere excepting in sacred places and pasture lands.

Article VII.

Russian subjects shall be empowered to enter into agreement with the Mongolian Government respecting the working of minerals and timber, fisheries, etc.

Article VIII.

The Russian Government shall have the right, in agreement with the Government of Mongolia, to appoint consuls in those parts of Mongolia it shall deem necessary.

Similarly, the Mongolian Government shall be empowered to have government agents at those frontier parts of the empire where, by mutual agreement, it shall be found necessary.

Article IX.

At points where there are Russian consulates, as also in other localities of importance for Russian trade, there shall be allotted, by mutual agreement between Russian consuls and the Mongolian Government, special "factories" for various branches of industry and the residence of Russian subjects. These "factories" shall be under the exclusive control of the above-mentioned consuls, or the heads of the Russian commercial companies if there be no Russian consul.

Article X.

Russian subjects, in agreement with the Mongolian Government, shall retain the right to institute, at their own cost, a postal service for the dispatch of letters and the transit of wares between various localities in Mongolia and also between specified localities and points on the Russian frontier. In the event of the construction of "stages" and other necessary buildings, the regulations set forth in Article VI of this protocol must be duly observed.

Article XI.

Russian consuls in Mongolia, in case of need, shall avail themselves of Mongolian Government postal establishments and messengers for the dispatch of official correspondence, and for other official requirements, provided that the gratuitous requisition for this purpose shall not exceed one hundred horses and thirty camels per month. On every occasion, a courier's passport must be obtained from the Government of Mongolia. When traveling, Russian consuls, and Russian officials in general, shall avail themselves of the same establishments upon payment. The right to avail themselves of Mongolian Government "stages" shall be extended to private individuals, who are Russian subjects, upon payment for the use of such "stages" of amounts which shall be determined in agreement with the Mongolian Government.

Article XII.

Russian subjects shall be granted the right to sail their own merchant vessels on, and to trade with the inhabitants along the banks of, those rivers and their tributaries which, running first through Mongolia, subsequently enter Russian territory. The Russian Government shall afford the Government of Mongolia assistance in the improvement of navigation on these rivers, the establishment of the necessary beacons, etc. The Mongolian Government authorities shall assign on these rivers places for the berthing of vessels, for the construction of wharves and warehouses, for the preparation of fuel, etc., being guided on these occasions by the enactments of Article VI of the present protocol.

Article XIII.

Russian subjects shall have the right to avail themselves of all land and water routes for the carriage of wares and the droving of cattle, and, upon agreement with the Mongolian authorities, they may construct, at their own cost, bridges, ferries, etc., with the right to exact a special due from persons crossing over.

Article XIV.

Traveling cattle, the property of Russian subjects, may stop for the purpose of resting and feeding. In the event of prolonged halts being necessary, the local authorities shall assign proper pasturage areas along traveling cattle routes, and at cattle markets. Fees shall be exacted for the use of these pasturing areas for periods exceeding three months.

Article XV.

The established usage of the Russian frontier population harvesting (hay), as also hunting and fishing, across the Mongolian borders shall remain in force in the future without any alteration.

Article XVI.

Agreements between Russian subjects and institutions on the one side and Mongolians and Chinese on the other may be concluded verbally or in writing, and the contracting parties may present the agreement concluded to the local government authorities for certification. Should the latter see any objection to certifying the contract, they must immediately notify the fact to a Russian consul, and the misunderstanding which has arisen shall be settled in agreement with him.

It is hereby laid down that contracts respecting real estate must be in written form, and presented for certification and confirmation to the proper Mongolian Government authorities and a Russian consul. Documents bestowing rights to exploit natural resources require the confirmation of the Government of Mongolia.

In the event of disputes arising over agreements concluded verbally or in writing, the parties may settle the matter amicably with the assistance of arbitrators selected by each party. Should no settlement be reached by this method, the matter shall be decided by a mixed legal commission.

There shall be both permanent and temporary mixed legal commissions. Permanent commissions shall be instituted at the places of residence of Russian consuls, and shall consist of the consul, or his representative, and a delegate of the Mongolian authorities of corresponding rank. Temporary commissions shall be instituted at places other than those already specified, as cases arise, and shall consist of representatives of a Russian consul and the prince of that "khoshun" to which the defendant belongs or in which he resides. Mixed commissions shall be empowered to call in as experts persons with a knowledge of the case from among Russian subjects, Mongolians, and Chinese. The decisions of the mixed legal commissions shall

be put into execution without delay, in the case of Russian subjects through a Russian consul, and in the case of Mongolians and Chinese through the prince of the "khoshun" to which the defendant belongs or in which he is resident.

Article XVII.

The present protocol shall come into force from the date of its signature.

In witness whereof, the respective plenipotentiaries, finding, upon comparison of the two parallel texts of the present protocol—Russian and Mongol—drawn up in duplicate, that the texts correspond, have signed each of them, affixed their seals, and exchanged texts.

Executed at Urga, the 21st October, 1912 (o. s.), and by the Mongolian calendar, on the twenty-fourth day of the last autumn moon, in the second year of the administration of the Unanimously Proclaimed.

[In the original follow the signature of M. Korostovetz, Minister Plenipotentiary; and in the Mongol language the signatures of the President of the Mongolian Council of Ministers, and the Plenipotentiaries, the Ministers of the Interior, Foreign Affairs, War, Finance, and of Justice].

DECLARATION AND EXCHANGE OF NOTES BY RUSSIA AND CHINA¹

(Signed at Peking, October 23/ November 5, 1913)

The Imperial Government of Russia having formulated the principles which it took as the basis of its relations with China as regards Outer Mongolia, and the Government of the Chinese Republic having stated its approval of the said principles, the two governments have agreed upon the following:

I.

Russia recognizes that Outer Mongolia is under the suzerainty of China.

II.

China recognizes the autonomy of Outer Mongolia.

¹ 10 Am. J. Int. Law (October, 1916), Supplement, 246-249.

III.

Recognizing the exclusive right of the Mongols of Outer Mongolia to provide for the internal administration of Autonomous Mongolia and to settle all questions of a commercial and industrial nature relating to this country, China binds itself not to intervene in these matters and consequently will not send troops into Outer Mongolia, nor will it keep any civil or military officials there, and it will abstain from colonizing in this country. It is, however, understood that a Dignitary sent by the Chinese Government may reside at Urga, accompanied by the necessary subordinates and an escort. Moreover, the Chinese Government may, in case of need, keep in certain localities of Outer Mongolia, to be determined in the course of the conferences provided for in Article V of the present agreement, agents for the protection of the interests of its subjects. Russia, on its side, binds itself not to keep troops in Outer Mongolia, with the exception of consular guards, and not to intervene in any branch of the administration of this country and to abstain from colonizing.

IV.

China declares itself ready to accept the good offices of Russia for the establishment of its relations with Outer Mongolia, in conformity with the principles above set forth and with the stipulations of the Russo-Mongolian Commercial Protocol of October 21, 1912 (November 3, 1912).

V.

Questions pertaining to the interests of Russia and of China in Outer Mongolia and resulting from the new state of affairs in this country will be the subject of subsequent conferences.

In faith whereof the undersigned, duly authorized to this effect, have signed the present Declaration and have affixed their seals thereto.

Done at Peking, in duplicate, October 23/ November 5, nineteen hundred and thirteen, corresponding to the fifth day of the eleventh month of the second year of the Chinese Republic.

SUN PAO-CHI (Minister of Foreign Affairs)

B. KRUPENSKY (Russian Minister)

*Note of the Russian Minister at Peking to the Chinese Minister
for Foreign Affairs*

In signing the Declaration under date of this day relating to Outer Mongolia, the undersigned, Envoy Extraordinary and Minister

Plenipotentiary of His Majesty the Emperor of all the Russias, duly authorized to this effect, has the honor to declare, in the name of his government, to His Excellency Mr. Sun Pao-chi, Minister of Foreign Affairs of the Chinese Republic, the following:

1. Russia recognizes that the territory of Outer Mongolia is a part of the territory of China.

2. As regards questions of a political and territorial nature, the Chinese Government shall come to an agreement with the Russian Government through negotiations in which the authorities of Outer Mongolia shall take part.

3. The conferences provided for in Article V of the Declaration shall take place between the three interested parties, who shall designate for this purpose a place where their delegates shall meet.

4. Outer Mongolia shall comprise the regions which have been under the jurisdiction of the Chinese Amban of Urga, of the Tartar General of Oulïassoutai, and of the Chinese Amban of Kobdo. Inasmuch as there are no detailed maps of Mongolia and as the boundaries of the administrative divisions of this country are uncertain, it is agreed that the exact boundaries of Outer Mongolia, as well as the boundary between the district of Kobdo and the district of Altai, shall be the subject of the subsequent conferences provided for in Article V of the Declaration.

The undersigned takes advantage of this opportunity to repeat to His Excellency Mr. Sun Pao-chi the assurances of his very high consideration.

(Signed) B. KRUPENSKY.

*Note of the Chinese Minister for Foreign Affairs to the Russian
Minister at Peking*

In signing the Declaration under date of this day relating to Outer Mongolia, the undersigned, Minister of Foreign Affairs of the Chinese Republic, duly authorized to this effect, has the honor to declare, in the name of his government, to his Excellency Mr. Krupensky, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of all the Russias, the following:

1. Russia recognizes that the territory of Outer Mongolia is a part of the territory of China.

2. As regards questions of a political and territorial nature, the Chinese Government shall come to an agreement with the Russian

Government through negotiations in which the authorities of Outer Mongolia shall take part.

3. The conferences provided for in Article V of the Declaration shall take place between the three interested parties, who shall designate for this purpose a place where their delegates shall meet.

4. Outer Mongolia shall comprise the regions which have been under the jurisdiction of the Chinese Amban of Urga, of the Tartar General of Ouliassoutai, and of the Chinese Amban of Kobdo. Inasmuch as there are no detailed maps of Mongolia and as the boundaries of the administrative divisions of the country are uncertain, it is agreed that the exact boundaries of Outer Mongolia, as well as the boundary between the district of Kobdo and the district of Altai, shall be the subject of subsequent conferences provided for in Article V of the Declaration.

The undersigned takes advantage of this opportunity to repeat to His Excellency Mr. Krupensky the assurances of his very high consideration.

(Signed) SUN PAO-CHI.

THE RUSSO-MONGOLIAN RAILWAY AGREEMENT ¹

(Signed at Kiachta, Sept. 30, 1914)

Article I.

The Russian Government hereby recognizes the permanent right of the Mongolian Government to build railways within the boundaries of its own territory.

Article II.

The Russian and Mongolian Governments shall consult each other to decide the railway lines and procedure of their building, which should be carried out in such a way as to benefit both parties concerned.

Article III.

In case of railway building, whether financed by the Russian or Mongolian Government or by private persons, the Russian Government shall render adequate help to the Mongolian Government.

Article IV.

When such railways as will connect with the railways on Russian frontiers are to be built, the Russian and Mongolian Governments

¹ Peking Gazette, Dec. 8, 1914.

shall consult each other on the terms concerning the privileges, localities and railway revenue regarding the same.

Article V.

Whereas the Mongolian Government has the right to build railways within the boundaries of its own territory, if it can raise funds internally to build paying railways, the Russian Government shall not interfere with it. But should the Mongolian Government concede such rights to other countries, the Mongolian Government, for the sake of friendly relations with Russia, should discuss this matter with the Russian Government, before the former makes the actual concession, in order to ascertain whether the projected lines of railway would jeopardize the Russian interest from an economical or military standpoint.

Article VI.

This treaty shall be duplicated in both the Mongolian and Russian languages. One copy shall be deposited in the office of the Russian Consul-General in Mongolia and the other in the office of the Ministry of Foreign Affairs of the Mongolian Government.

APPENDIX F.

TREATY OF COMMERCE AND NAVIGATION BETWEEN CHINA AND SWEDEN¹

*(Signed, Peking, July 2, 1908; ratifications exchanged,
Peking, June 14, 1909)*

His Majesty the King of Sweden and His Majesty the Emperor of China, desiring to maintain firm, lasting, and sincere friendship and to extend further the commercial relations between their respective countries, and having resolved to conclude a Treaty of Friendship, Commerce, and Navigation, have for that purpose named as their Plenipotentiaries, that is to say:

His Majesty the King of Sweden: Gustaf Oscar Wallenberg, His Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Peking; and

His Majesty the Emperor of China: His Excellency Lien Fang, His Majesty's High Commissioner Plenipotentiary and Senior Vice-President of the Wai-wu Pu;

Who having communicated to each other their respective full powers, and found them to be in good and due form, have agreed upon and concluded the following Articles:—

Article I.

There shall be, as there have always been, perpetual peace and friendship between His Majesty the King of Sweden and His Majesty the Emperor of China, and between their respective subjects, who shall enjoy equally in the respective countries of the High Contracting Parties full and entire protection of their persons and property.

Article II.

It is agreed by the High Contracting Parties that His Majesty the King of Sweden may, if he see fit, accredit a Diplomatic

¹ 101 State Papers (1907-1908), 945-952.

Representative to the Court of Peking, and His Majesty the Emperor of China may, if he see fit, accredit a Diplomatic Representative to the Court of Stockholm.

The Diplomatic Representatives thus accredited shall enjoy all the prerogatives, privileges and immunities accorded by international usage to such Representatives, and they shall also in all respects be entitled to the treatment extended to similar Representatives of the most favoured nation.

Their persons, families, suites, establishments, residences, and correspondence shall be held inviolable. They shall be at liberty to select and appoint their own employés, couriers, interpreters, servants, and attendants without any kind of molestation.

His Royal Swedish Majesty's Representative shall be given audience of His Majesty the Emperor of China whenever necessary to present his Letters of Credence or any communication from the King of Sweden. His Imperial Chinese Majesty's Representative shall be given audience of His Majesty the King of Sweden whenever necessary to present his Letters of Credence or any communication from the Emperor of China. The ceremonial adopted at the Courts of the High Contracting Parties as regards the Representatives above mentioned shall conform in all respects with the usages of nations of equal rank, without any loss of prestige on one side or the other.

The English text of all notes or despatches from Swedish officials, and the Chinese text of all notes or despatches from Chinese officials, shall be authoritative.

Article III.

His Majesty the King of Sweden may appoint Consuls-General, Consuls, Vice-Consuls, and Consular Agents to reside at such of the ports, cities, and towns of China which are now or may hereafter be opened to foreign residence and trade, as the interests of the Kingdom of Sweden may require.

His Majesty the Emperor of China may appoint Consuls-General, Consuls, Vice-Consuls and Consular Agents to reside at all places in Sweden where Consular officers of other nations are now or may hereafter be allowed to reside, as the interests of the Empire of China may require.

The Consuls and other officials of the High Contracting Parties shall treat each other with due respect, and they shall enjoy each in the other's country all the attributes, authority, privileges, and immunities which are or may hereafter be extended to similar officers of the most favoured nation.

On the arrival of a Consul, who has been duly appointed, at his post, it shall be the duty of the Diplomatic Representative to inform the Minister of Foreign Affairs, who shall in accordance with international usage forthwith issue the proper recognition of the said Consul, without fee or charge. Such recognition, however, may be withdrawn, should it be found that the said Consul has contravened international usage in the performance of his duties. At places where no Consul is appointed as aforesaid, the Consul of a friendly nation may be requested to perform the functions. At places where there is no Consular Representative the local authorities shall see that the subjects of the other Contracting Party enjoy the benefits of the present Treaty.

Article IV.¹

Chinese subjects may proceed to and from any place in Sweden with their merchandise for purposes of trade. Swedish subjects may proceed to and from any place in China which is now or may hereafter be opened to foreign commerce, with their merchandise for purposes of trade. The subjects of the High Contracting Parties may in accordance with existing rules and with the privileges enjoyed by subjects of the most favoured nation carry on trade, industries, and manufactures or pursue any lawful avocations at all the places above mentioned, rent or purchase houses for residence and for business purposes, rent or lease land, build houses, churches, cemeteries, and hospitals, and take persons into their service and employ them in any lawful capacity without restraint or hindrance from the local authorities. They shall in all respects enjoy the same privileges and immunities as are now or may hereafter be granted by the High Contracting Parties to the subjects of the most favoured nation.

Article V.

The Tariff and Tariff Rules now in force, or hereafter concluded, between China and the foreign Powers shall be applicable to all articles imported into China by Swedish subjects or from Sweden, or exported from China by Swedish subjects or to Sweden. In no case shall the import or export duty thus paid be other or higher than the duty on similar articles which is paid by subjects of the most favoured nation.

The Tariff Rules now in force, or hereafter concluded, between China and the foreign Powers shall also be applicable to articles the importation and exportation of which is prohibited, and to duty-free articles.

¹ See Additional Article, *infra*, 266-267.

Articles duly imported into China by Swedish subjects upon which import duty has been paid, and which it is desired to convey to an inland market and to clear of all transit duties by payment of a single commutation transit tax or duty; and articles for export purchased in China elsewhere than at an open port, upon which export duty has been paid, and which it is desired to clear of all transit duties by payment of a single commutation tax or duty, shall be treated according to the existing Rules between China and the foreign Powers. The transit tax or duty shall in no case exceed that which is paid by subjects of the most favoured nation.

Goods transported from one Treaty port to another, or temporarily stored in a bonded warehouse at a Treaty port, or re-exported, by Swedish subjects, shall be subject to the general regulations now in force, or the new supplementary regulations which may hereafter be negotiated, between China and the foreign Powers.

Chinese articles imported into Sweden, or articles of other nations imported into Sweden, by Chinese subjects, shall pay an import duty no higher or other than that which is paid by the subjects of the most favoured nation.

The Chinese authorities at the several open ports shall adopt such means as they may judge most proper to prevent the revenue suffering from fraud or smuggling.

Article VI.

Swedish merchant vessels may proceed to all the Treaty ports of China already opened or which may hereafter be opened, for the transportation of merchandise and for purposes of trade. They may also proceed to the inland waters in China which foreign merchant vessels are at liberty to navigate, and to the ports of call along the rivers for the purpose of landing and shipping passengers and goods. In all these matters they shall be subject to the rules and regulations concluded by China with other foreign Powers.

If a Swedish vessel should unlawfully enter ports other than open ports and ports of call in China, or carry on clandestine trade along the coast or rivers, the vessel with her cargo shall be subject to confiscation by the Chinese Government.

Chinese merchant vessels may proceed to and from any of the harbours in Sweden which other foreign merchant vessels are at liberty to frequent, for purposes of trade and for the shipping and landing of passengers and goods.

The Merchant vessels of the High Contracting Parties shall enjoy most-favoured-nation treatment in each other's dominions.

Merchant vessels of the High Contracting Parties may hire boats in each other's ports for the conveyance of passengers and goods, and may engage the services of pilots for the purpose of entering or leaving port. They shall pay the tonnage dues or other fees or charges according to the existing regulations in the two countries, but they shall not be required to pay other or higher tonnage dues or fees or charges than the vessels of the most favoured nation. Should a vessel of either of the High Contracting Parties be stranded or wrecked on the coast of the other, the local authorities shall immediately adopt measures for rescuing the passengers and crew and to give the most-favoured-nation treatment. In the case of a vessel sustaining injury, or being compelled for other reason to seek a place of refuge, such vessel shall be permitted to enter any near port and to anchor there temporarily, without being subject to the payment of tonnage dues. The cargo, if landed in order to effect the necessary repairs to the vessel, but not for sale, shall not be liable to pay duties, provided that it remains under the supervision of the Custom authorities.

Article VII.

The vessels of both the High Contracting Parties, which are at liberty to trade freely at open ports in time of peace, shall, in the event of either of the High Contracting Parties being at war with any foreign nation and for that reason excluding the vessels of that nation from her ports, be entitled none the less to continue to pursue their commerce in freedom and security and to transport goods to and from the ports of the belligerent Powers, full respect being paid to the neutrality of the flag in strict compliance with the usages of neutrality, provided that the said neutral flag shall not protect vessels engaged in the transportation of troops, and that the said flag shall not be illegally used to enable the enemy's ships with their cargoes to enter the ports of the High Contracting Party concerned. Vessels offending against the above provisions shall be subject to confiscation by the Government offended.

Article VIII.

The ships of war of either of the High Contracting Parties, provided previous notice has been given, shall be admitted into the ports of the other, where such vessels of other nations are allowed to enter, and shall receive the same treatment as ships of war of the most favoured nation. They shall receive from the local authorities every facility for the purchase of coal and provisions, for procuring water, and if occasion requires, for the making of repairs.

Ships of war shall be exempt from the payment of duties both on arrival and departure.

The commanders of ships of war shall hold intercourse with the superior officers of ports on terms of equality.

Article IX.

Swedish subjects may travel to all parts of the interior of China under passports issued by Swedish Consuls and countersigned by the local authorities. These passports, if demanded, must be produced for examination in the localities passed through. If the passports be not irregular, the bearers will be allowed to proceed and they shall be at liberty to hire persons, animals, carts, or vessels for their own conveyance or for the carriage of their personal effects or merchandise. If the Swedish subjects be without passports or if they commit any offence against the law, they shall be handed over to the nearest Consul for punishment; but they shall only be subject to necessary restraint and in no case to ill-usage. Such passports shall remain in force for a period of twelve months from the date of issue. Swedish subjects travelling in the interior without passports shall be liable to a fine not exceeding 300 taels. They may, however, go without passports on excursions from any of the ports open to trade, to a distance not exceeding 100 Chinese *li* and for a period not exceeding five days. The provisions of this Article do not apply to crews of ships.

Chinese subjects shall be at liberty to travel throughout the territory of Sweden, provided that they conduct themselves peaceably and do not violate the laws and regulations of the country.

Article X.

The duly authorized Swedish authorities shall hear and decide all cases brought against Swedish subjects by Swedish subjects, or by the subjects or citizens of any other foreign Power, without the intervention of the Chinese Authorities.

However, as China is now engaged in reforming her judicial system, it is hereby agreed that as soon as all other Treaty Powers have agreed to relinquish their extraterritorial rights, Sweden will also be prepared to do so.

Charges or complaints of a civil nature brought by the subjects of either of the High Contracting Parties against the subjects of the other shall be heard and decided impartially by the authorities who have jurisdiction over the defendants, in accordance with the procedure observed in similar charges or complaints brought by subjects of the most favoured nation.

Subjects of either of the High Contracting Parties charged with the commission of any crimes or offences shall be tried by the

authorities who have jurisdiction over the accused with the procedure observed in similar cases of the most favoured nation, and, if found guilty, shall be punished in accordance with the laws of their own country.

Article XI.

If Swedish subjects in China, who have committed offences or have failed to discharge debts and fraudulently abscond in order to evade a summons or a warrant of arrest, should flee to the interior of China or take refuge in houses occupied by Chinese subjects or on board Chinese ships, the Chinese authorities shall, at the request of the Swedish Consul, deliver them to the Swedish authorities.

In like manner, if Chinese subjects in China, who have committed offences or have failed to discharge debts and fraudulently abscond, should take refuge in houses occupied by Swedish subjects in China or on board Swedish ships in Chinese waters, they shall be delivered up at the request of the Chinese authorities made to the Swedish authorities.

Such offenders shall in no case be shielded or withheld from arrest by either of the High Contracting Parties.

Article XII.

The principles of the Christian religion, as professed by the Protestant and Roman Catholic Churches, are recognized as teaching men to do good and to do to others as they would have others do to them. Those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether Swedish subject or Chinese convert, who, according to these tenets, peaceably teaches and practises the principles of Christianity shall in no case be interfered with or molested therefor. No restrictions shall be placed on Chinese joining Christian Churches. Converts and non-converts, being Chinese subjects, shall alike conform to the laws of China; and living together in peace and amity, shall pay due respect to those in authority. The fact of being a convert shall not protect a Chinese subject from the consequences of any offence he may have committed before or may commit after his admission into the Church, or exempt him from paying legal taxes levied on Chinese subjects generally, except taxes and contributions levied for the support of religious customs and practices contrary to their faith. Missionaries shall not interfere with the exercise by the native authorities of their jurisdiction over Chinese subjects; nor shall the native authorities make any distinction between converts and non-converts, but shall administer the laws without partiality so that both classes may live together in peace.

Swedish missionary societies shall be permitted to rent and to lease in perpetuity, as the property of such societies, buildings or lands in all parts of the Empire for missionary purposes, and after the title-deeds have been found in order and duly stamped by the local authorities, to erect such suitable buildings as may be required for carrying on their good work.

Article XIII.

It is hereby declared that the provisions of the Treaty now existing between Sweden and China, in so far as they are not modified by stipulations of the present Treaty, shall continue in full force, and it is further expressly stipulated that the Governments, officers, and subjects of both of the High Contracting Parties shall be allowed free and full participation in all privileges, immunities, and advantages which have been or may hereafter be granted by either of the High Contracting Parties to the Governments, officers, and subjects of any other Treaty Powers, in regard to commerce, navigation, shipping, industries, or property.

The High Contracting Parties reserve to themselves the right to conclude agreements regarding frontier trade with neighbouring countries, and it is understood that, in case either of the High Contracting Parties should hereafter grant to any other nation advantages subject to special conditions, the other High Contracting Party shall enjoy said advantages only provided it complies with the conditions imposed therein or their equivalent, to be mutually agreed upon.

Article XIV.

The Agreements, Rules, and Regulations subsisting between and binding both China and the Treaty Powers, so far as they are applicable and not inconsistent with the provisions of this Treaty, shall be binding on both of the High Contracting Parties.

Article XV.

It is agreed that either of the High Contracting Parties may demand a revision of the Articles of this Treaty at the end of ten years from the date of the exchange of the ratifications; but if no such demand for the revision is expressed on either side within six months after the end of the first ten years, then the Treaty in its present form shall remain in force for ten years more, reckoned from the end of the preceding ten years, and so it shall be at the end of each successive period of ten years.

Article XVI.

This Treaty shall, on the exchange of ratifications by His Majesty the King of Sweden and by His Majesty the Emperor of China, be kept and sacredly guarded in the following manner, viz:—

The original Treaty as ratified by the Emperor of China shall be deposited at Stockholm, the capital of His Majesty the King of Sweden, in charge of the Ministry of Foreign Affairs; and as ratified by the King of Sweden shall be deposited at Peking, the capital of His Majesty the Emperor of China, in charge of the Wai-wu Pu.

The High Contracting Parties agree that immediately after the exchange of ratifications, the provisions of the Treaty shall be published in order that the officials and people of the two countries may know and observe them.

Article XVII.

The present Treaty is signed in the Swedish, Chinese, and English languages. In order, however, to prevent future discussions, the Plenipotentiaries of the High Contracting Parties have agreed that in case of any divergence in the interpretation between the Swedish and Chinese text of the Treaty, the difference shall be settled by reference to the English text.

The ratifications of the Treaty, under the hand of His Majesty the King of Sweden and of His Majesty the Emperor of China respectively, shall be exchanged at Peking within a year from the date of signature.

In token whereof the respective Plenipotentiaries have signed and sealed this Treaty—two copies in Swedish, two in Chinese, and two in English.

Done at Peking, this 2nd day of July, in the year of Our Lord 1908, corresponding with the Chinese date the 4th day of the 6th moon of the 34th year of Kwang Hsü.

G. O. WALLENBERG.
LIEN FANG.

ADDITIONAL ARTICLE

(Signed, Peking, May 24, 1909)

The following Additional Article which has to-day been concluded and signed by the undersigned Gustaf Oscar Wallenberg, His Swedish Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Peking, and by his Excellency Lien Fang, Vice-

President of the Wai-wu Pu, both being duly authorized thereto by their respective Governments, shall form part and be appended to the Treaty between Sweden and China which was signed and concluded at Peking on the 2nd July, 1908, corresponding with the Chinese date the 4th day of the 6th moon of the 34th year of Kwang Hsü:—

Additional Article.—It is expressly agreed by the High Contracting Parties that the provisions of Article IV of the present Treaty shall in no respect whatever confer upon Swedish subjects in China or upon Chinese subjects in Sweden any privileges or immunities other than those already granted or which may hereafter be granted to the subjects or citizens of the most favoured nation.

Done at Peking, the 24th May, in the year of Our Lord 1909, corresponding with the Chinese date the 6th day of the 4th moon of the 1st year of Hsuan Tung.

G. O. WALLENBERG.

LIEN FANG.

APPENDIX G.

THE CHENG-CHIA-TUN AFFAIR¹

(August, 1916—January, 1917)

CHINESE OFFICIAL COMMUNIQUE AND TEXT OF DOCUMENTS EXCHANGED

HISTORY OF NEGOTIATIONS

In August, 1916, a dispute between a Japanese merchant named Yoshimoto and a Chinese soldier of the 28th Division stationed at Chengchiatun, led to a fracas between Japanese and Chinese soldiers. The Japanese soldiers had been in Chengchiatun for over two years. They had no justification for being there. The Chinese Government had repeatedly protested against their presence.

A Japanese policeman who was informed of the dispute induced a Japanese Lieutenant to lead some Japanese soldiers to the Chinese barracks to demand satisfaction. A fracas ensued in which four Chinese and twelve Japanese soldiers were killed and others wounded. The Japanese troops were reinforced and new detachments were stationed at posts on the highway between Chengchiatun and Ssupinkai.

On September 2nd, the Japanese Minister (Baron Hayashi) submitted to the Foreign Office a series of eight demands divided into two categories. Four were Demands properly so called and four Desiderata.

THE DEMANDS

The Demands were:

1. Punishment of the General commanding the 28th Division.
2. The dismissal of the officers at Chengchiatun responsible for the occurrence, as well as the severe punishment of those who took direct part in the fracas.

¹ Peking Gazette, Jan. 29, 1917.

3. Proclamation to be posted ordering all Chinese soldiers and civilians in South Manchuria and Eastern Inner Mongolia to refrain from any act calculated to provoke a breach of the peace with Japanese soldiers or civilians.

4. China to agree to the stationing of Japanese police officers in places in South Manchuria and Eastern Inner Mongolia where their presence was considered necessary for the protection of Japanese subjects. China also to agree to the engagement by the officials of South Manchuria of Japanese police advisers.

THE DESIDERATA

The Desiderata were:

1. Chinese troops stationed in South Manchuria and Eastern Inner Mongolia to employ a certain number of Japanese military officers as advisers.

2. Chinese military cadet schools to employ a certain number of Japanese military officers as instructors.

3. The Military Governor of Mukden to proceed personally to Port Arthur to the Japanese Military Governor of Kwantung to apologize for the occurrence and to tender similar personal apologies to the Japanese Consul-General in Mukden.

4. Adequate compensation to be paid by China to the Japanese sufferers and to the families of those killed.

In deference to the expressed desire of the Japanese Government the Chinese Government did not discuss the rights and wrongs of the case itself but proceeded direct to the discussion of the foregoing demands and desiderata, the Chinese Government throughout the negotiations being animated by a sincere desire to meet all Japanese proposals in a spirit of friendly compromise.

From September 9th to November 24th frequent conferences were held, and the five demands embodied in the exchange of notes later referred to were verbally agreed upon. While disposed, however, to make every concession consistent with the preservation of China's sovereignty, the Chinese Government could not consent to the stationing of Japanese police officers in South Manchuria and Eastern Inner Mongolia and to the employment of Japanese military advisers and instructors.

On October 18th the Japanese Minister submitted a memorandum, setting forth the duties of Japanese police officers and seeking to prove that these duties would not conflict with the duties of Chinese police in the same areas.

Dr. Wu Ting-fang, after having assumed charge of the Ministry of Foreign Affairs, continued the negotiations on December 19th. Several conferences were held, the Japanese Minister pressing for acceptance of the demands for the employment of Japanese police officers and military instructors and advisers, and the Foreign Minister contending that such demands were neither just nor reasonable.

On January 5th the Japanese Minister handed the Chinese Government three notes-verbales.

NOTES-VERBALES

The first had regard to the engagement of military instructors in Chinese cadet schools, and explained that this desire on the part of Japan was inspired by the wish to assist in the development of a friendly spirit on the part of the Chinese military in Manchuria and in Eastern Inner Mongolia, so that future recurrence of similar misunderstandings might be avoided. Japan expressed the hope that Japanese military instructors in the cadet schools would be appointed. Inasmuch, however, as the question was one which concerned Chinese military affairs it ought to be left to the discretion of the Chinese Government, and the Japanese Government would not insist upon it.

The second had regard to the employment of military advisers in South Manchuria and Eastern Inner Mongolia, and affirmed that this proposal on the part of Japan was inspired by the hope of bringing about a friendly interchange of views between the military of the two countries so as to prevent misunderstandings. Japan expressed the hope that Japanese military advisers in South Manchuria and Eastern Inner Mongolia would be appointed. Inasmuch, however, as this was a question concerning the military administration it must be left to the discretion of the Chinese Government, and the Japanese Government would not insist upon it.

The third note-verbale had regard to the stationing of police officers. Japanese subjects, it said, travelling and residing in South Manchuria and Eastern Inner Mongolia must increase. For their protection and the preservation of order among them and to prevent misunderstandings, it is necessary to increase the establishment of Japanese police officers and police stations. This is a corollary of the rights of extraterritoriality and does not violate Chinese sovereignty. Should the Chinese Government not express its concurrence with this view, the Japanese Government would, nevertheless, in case of necessity, be forced to carry it into effect.

CHINA'S REPLY

After due consideration the Chinese Government replied on January 12th:

1. In the military cadet schools China has hitherto employed only Chinese instructors. She has no intention at present of employing foreign military instructors.

2. In the office of the Military Governor of Mukden a Japanese military adviser is already employed. The Japanese note-verbale is noted.

3. In regard to the stationing of Japanese police officers the Agreement of May 25th, 1915, provides that all Japanese subjects in South Manchuria and in Eastern Inner Mongolia referred to in the Agreement, shall "*SUBMIT TO THE POLICE LAWS AND ORDINANCES AND TAXATION OF CHINA.*" Questions arising from extraterritorial rights were thus provided for. Although the Japanese Minister may give an assurance that the Japanese police will not infringe the rights of the Chinese police and of the Chinese local Administration, the stationing of Japanese police (in Chinese territory) will impair the spirit and the form of Chinese sovereignty and provoke misunderstanding on the part of the Chinese people to the detriment of friendly relations.

In regard to those Japanese police stations already established in Manchuria, the Chinese Government and Local Authorities have repeatedly protested against their presence. From investigations made by their delegates the Chinese Government are convinced that it was the Japanese police officer illegally stationed at Chengchiatun, despite the protests of the Chinese Government (Chengchiatun being Chinese territory far removed from the Railway Zone), whose action was the direct cause of the regrettable conflict. The Chinese Government can never consent to the establishment of Japanese police stations in South Manchuria. It again protests and asks for the removal of those police stations already established.

The Chinese Government therefore requested that this demand should be abandoned, and declared that it could not recognize any action taken in pursuance of the Japanese statement that, should the Chinese Government not express its concurrence with this demand, the Japanese Government would, nevertheless, in case of necessity carry it into effect.

END OF NEGOTIATIONS

The negotiations ended by the Governments agreeing to embody in an exchange of notes the following five stipulations:—

1. The General commanding the 28th Division will be reproved.
2. Officers responsible will be punished according to law. If the law provides for severe punishment, such punishment will be inflicted.

3. Proclamations will be issued enjoining Chinese soldiers and civilians in the districts where there is mixed residence to accord considerate treatment to Japanese soldiers and civilians.

4. The Military Governor of Mukden will send a representative to Port Arthur to convey his regret when the Military Governor of Kwantung and the Japanese Consul-General are there together.

5. Solatium of \$500 (Five Hundred Dollars) will be given to the Japanese merchant Yoshimoto.

The Chengchiatun incident having originated in a conflict between Chinese and Japanese soldiers, the Chinese Government considers that all Japanese soldiers within the district should be withdrawn in order to prevent any future disturbance. On January 22nd the Wai Chiao Pu requested the Japanese Minister to state on what date the Japanese soldiers stationed between Ssupinkai and Chengchiatun would be withdrawn. On the same day a reply was received from the Japanese Minister, stating that when the Five Articles agreed upon are executed, the Japanese troops sent to reinforce the Japanese detachment at the time of the incident will be withdrawn.

Throughout the negotiations the Chinese Government, always animated by a spirit of compromise, has been desirous of coming to a friendly settlement with Japan as proved by the concessions made. It confidently hopes that the Japanese Government will recognize this manifestation of good will, and by the mutual exercise of great discipline and restraint in Manchuria in the future, any recurrence of such regrettable incidents will be avoided.

THE ORIGINAL DEMANDS

MEMORANDUM handed by the Japanese Minister to Dr. Chen Chin-tao, Acting Minister of Foreign Affairs.

The Imperial Government of Japan feels that the unfortunate Chengchiatun incident should occur all of a sudden at a time when the relations between Japan and China have recently greatly improved, and their mutual friendship has, just then, marked the beginning of a new era, is a matter of deep regret. It, having made a careful investigation of the facts from all sides, is sincerely hoping for the rendition of an equitable decision based thereon. In a word, the present case arose out of the provocation on the part of the

Chinese soldiers. Furthermore, the fact that the Japanese forces were invested and attacked by the Chinese soldiers admits of no doubt. Hence, it cannot be questioned but that the matter is a serious one. The Imperial Government, however, paying great regard to the relations between Japan and China, feels compelled to present this memorandum with a view to settling the case in dispute in a peaceful manner.

The Chinese Government is called upon to immediately effect the following provisions:—

Punishment of the General commanding the 28th Division. The dismissal of all Chinese military officers responsible for this incident as well as the severe punishment of those who took direct part in the fracas.

Proclamations to be posted enjoining the whole body of the Chinese troops stationed in South Manchuria and Eastern Inner Mongolia, to refrain from again provoking the Japanese forces, or soldiers, or other Japanese subjects, by either word or act; such proclamation to be also widely published by all Chinese officials functioning in those regions for the general information of the public.

To agree that the Japanese Government may, with a view to the protection and government of the Japanese subjects in South Manchuria and Eastern Inner Mongolia, send Japanese police officers to function at those places where considered to be necessary; also let the Chinese officials in South Manchuria employ more Japanese to serve as police advisers.

The following are optional with the Chinese Government:—

Every Chinese army headquarter stationed in South Manchuria and Eastern Inner Mongolia to employ a certain number of Japanese military officers as advisers.

Chinese military cadet schools to employ a certain number of Japanese military officers as instructors.

The Tu Chun of Fengtien Province to pay a personal visit and to apologise to both the Governor of Kwantung and Japanese Consul-General in Mukden.

Adequate compensation to be paid to the sufferers or their families.

NOTES-VERBALES

THE EMPLOYMENT OF MILITARY ADVISERS

NOTE-VERBALE handed by the Japanese Minister to the Chinese Minister of Foreign Affairs.

Peking, the 5th day of the 1st month
of the 6th year of Taisho.

The statement that if the Chinese Government should employ foreign advisers on military affairs in South Manchuria, Japanese will be employed first, etc., has been made in the note dated May 25th of the 4th year of the Republic of China, annexed to the treaty respecting South Manchuria and Eastern Inner Mongolia. As the employment of Japanese military advisers will facilitate mutual understanding between the military authorities of the two countries, and further as there is no doubt that this will help to prevent various troubles which may arise out of misunderstanding, the Imperial Government entertain the hope that the Chinese Government will continuously employ Japanese military advisers. However, it is not proper for the Imperial Government to insist upon this matter, since it concerns the military affairs of the Chinese Government, and should therefore be left to the discretion of the Chinese Government.

REPLY

Peking, the 12th day of the 1st month
of the 6th year of the Republic of
China.

The Minister of Foreign Affairs has the honour to acknowledge the receipt of the Japanese Minister's Note-Verbale of January 5, stating that

(Japanese Note repeated)

The Minister of Foreign Affairs has to state that there is a Japanese military adviser already engaged in the Tuchun's Yamen at Fengtien. The Note-Verbale is noted.

THE EMPLOYMENT OF MILITARY INSTRUCTORS

NOTE-VERBALE handed by the Japanese Minister to the Chinese Minister of Foreign Affairs.

Peking, the 5th day of the 1st month
of the 6th year of Taisho.

The Imperial Government hopes the Chinese Government will employ a number of Japanese military officers to be instructors in military cadet schools. This is aimed at helping the training of

military officers who will in the future be appointed to the various localities in Manchuria and Mongolia, and also to enlighten the spirit of friendship between China and Japan. Thus, it may be expected that unfortunate incidents like the Chengchiatun case will not occur again and that the root of trouble may be exterminated permanently. However, it is not proper for the Imperial Government to insist upon this matter, since it concerns the military affairs of the Chinese Government and should therefore be left to the discretion of the Chinese Government.

REPLY

Peking, the 12th day of the 1st month
of the 6th year of the Republic of
China.

The Chinese Minister of Foreign Affairs has the honour to acknowledge the receipt of the Japanese Minister's Note-Verbale of January 5th, stating that

(Japanese Note repeated)

The Minister of Foreign Affairs has to state that hitherto the military cadets school has employed only officers of the national army as instructors, and there is at present no intention of employing any foreigners.

AIDE-MEMOIRE

AIDE-MEMOIRE handed by the Japanese Minister to Dr. Chen Chin-tao, Acting Minister of Foreign Affairs.

Peking, the 18th day of the 10th
month of the 5th year of Taisho.

According to the new treaty concluded last year respecting South Manchuria and Eastern Inner Mongolia, Japanese subjects shall have the right of residence, travel and commercial and industrial trade in South Manchuria, and the right to undertake agricultural enterprises and industries incidental thereto in the eastern part of Inner Mongolia jointly with Chinese subjects. The number of Japanese subjects in South Manchuria and Eastern Inner Mongolia will, therefore, inevitably increase gradually. The Imperial Government of Japan considers it necessary to station Japanese police officers in these regions for the purpose of controlling and protecting their own subjects. It is a fact that a number of Japanese police officers have already been stationed in the interior of South Manchuria, and they have been recognised by the local officials of the localities concerned, since intercourse has been conducted between them. The Imperial Government of Japan proposes gradually to establish additional stations for Japanese police

officers in the interior of South Manchuria and Eastern Inner Mongolia wherever and whenever necessary. The localities where such stations for police officers are to be established will, of course, depend upon the number of Japanese subjects residing thereat and therefore cannot be specified in advance. Since this will involve great expense, it is unlikely that many police stations will be established at once. The organisation of such stations for police officers will also depend upon the existing conditions of the localities selected and the number of Japanese subjects residing at such places. There will be only a few Japanese police officers at each station as established. The more important duties of such police officers are as follows:—

1. To prevent Japanese subjects from committing crimes;
2. To protect Japanese subjects when attacked;
3. To search, arrest and escort Japanese prisoners under the jurisdiction of a Japanese consulate;
4. To attend to the enforcement of consular orders in connexion with civil cases, such as the duties of the registrar;
5. Investigation and supervision of the personal standing of Japanese subjects;
6. Control and discipline of Japanese subjects who violate the provisions of treaties between Japan and China; and
7. To see that Japanese subjects abide by the provisions of Chinese police regulations when the agreement between Japan and China respecting the same should actually come into force.

In short, the establishment of stations for Japanese police officers in South Manchuria and Eastern Inner Mongolia is based on consular jurisdiction, and its aim is efficiently to protect and discipline Japanese subjects, to bring about a completely satisfactory relationship between the officials and people of the two countries, and gradually to develop the financial relations between Japan and China. The Chinese Government is requested speedily to recognise the demands precisely, as it has the establishment of consulates and consular agents in the interior of South Manchuria in pursuance of the policy to maintain the friendly relations between China and Japan.

THE ESTABLISHMENT OF POLICE STATIONS

NOTE-VERBALE handed by the Japanese Minister to the Chinese Minister of Foreign Affairs.

Peking, the 5th day of the 1st month
of the 6th year of Taisho.

In an aide-memoire handed by the Japanese Minister to (Dr.) Chen, late Minister of Foreign Affairs, on October 18, 1916, it was

stated that in consequence of the operation of the Treaty respecting South Manchuria and Eastern Inner Mongolia, the Japanese subjects travelling and residing at those places will increase in number, and the Imperial Government, with a view to controlling and protecting those Japanese subjects, considers it necessary to increase the establishment of police stations, of which the Chinese Minister of Foreign Affairs is already aware.

The Imperial Government considers that the said demand, in the event of its withdrawal, will expose the Japanese subjects visiting and residing at those places to danger, thus causing trouble and giving rise to serious complications with Chinese officials and citizens.

Inasmuch as it is the duty of the Imperial Government to protect Japanese subjects and its right to control them, not only it cannot view such occurrences with indifference but, in view of the friendly relations of the two nations, it also deems it its duty to take precautionary measures.

As the stationing of Japanese police officers is but a corollary of the right of extraterritoriality, not to speak of the fact that it does not in the least prejudice Chinese sovereignty, it will help to improve the relations of the officials and people of the two countries and bring about the development of economic interests to no small degree.

Therefore the Imperial Government is convinced that the Chinese Government will, without doubt, give its consent, and the Imperial Government has to add that, while the Chinese Government is making up its mind and withholding its consent, the Imperial Government will nevertheless be constrained to carry it into effect in case of necessity.

REPLY

Peking, the 12th day of the 1st month
of the 6th year of the Republic of
China.

The Minister of Foreign Affairs has the honour to acknowledge the receipt of the Japanese Minister's Note-Verbale of January 5, stating that

(Japanese note repeated)

In reply the Minister of Foreign Affairs has to state that:

Whereas by virtue of the new Chino-Japanese Treaty, "Japanese subjects shall be free to reside and travel in South Manchuria and to

engage in business and manufacture of any kind whatsoever;” and the Japanese and Chinese may jointly undertake agricultural enterprises and industries incidental thereto in Eastern Inner Mongolia, the Chinese Government, in anticipation of the gradual increase in number of the Japanese subjects, therefore caused to be stipulated in Article 5 of the said Treaty that the Japanese subjects in South Manchuria and Eastern Inner Mongolia shall submit to the Chinese police laws and ordinances, so as to enable the Chinese police to effectively discharge the functions of protection and control.

Since the reason in support of Japanese proposal to station police officers was with a view to protect and control Japanese subjects, but as there are already treaty provisions, there is no necessity to station Japanese police officers, so as to avoid conflict with the Chinese police rights.

As the seven principal functions of the Japanese police officers, detailed in the aide-memoire of October 18th last, are those either which should properly belong to the Chinese police, or those which are provided for by the existing treaties or those which are the duties of the constables (marshals) of consular courts, there is no necessity for the establishment of a Japanese police force. Hence the question of police cannot be associated with extraterritoriality and the Chinese Government cannot recognize it as a corollary (of the right of extraterritoriality). Ever since the conclusion of extraterritoriality treaties between China and the foreign Powers for several decades, no such claim has ever been heard.

Although the Japanese Minister has repeatedly declared that the said police would not interfere with Chinese local administration and police rights, yet after serious consideration by the Chinese Government the stationing of foreign police within the confines of Chinese territory, no matter under whatever circumstances, is prejudicial to the spirit and form of Chinese sovereignty, tending to cause misunderstandings on the part of the people, thus placing an impediment to the friendship of the two nations.

As regards the Japanese police stations already established, the Chinese Government and the local authorities have repeatedly lodged their protests and have not accorded their recognition. Nor is the Chinese Government able to admit the reasons for the stationing of Japanese police officers as stated in the Verbale.

This matter has no connexion with the Chengchiatun case, and at the conferences the Japanese Minister has repeatedly expressed the desire to detach it from the Chengchiatun case. The Chinese Government considers it necessary to request the Japanese Government to abandon the matter. At the same time, it is not to be construed as

meaning that the Chinese Government has recognised any action to carry the matter into effect.

THE DEMANDS MUTUALLY AGREED TO

NOTE from the Japanese Minister to the Chinese Minister of Foreign Affairs.

Peking, the 22nd day of the 1st month
of the 6th year or Taisho.

I have the honour to inform Your Excellency that, with regard to the Chengchiatun affair, for the settlement of which several conferences have been held between me and the Chinese Ministry of Foreign Affairs, prior to Your Excellency's assumption of office, the articles set forth hereunder have been mutually agreed upon and, with the exception of such modifications and alterations to the phraseology, as have been considered, no further negotiation is possible. I, therefore, take this opportunity to submit the same to Your Excellency's consideration, and to request that a reply to that effect will be given.

1. The General commanding the 28th Division to be reproved.
2. The Chinese military officers responsible for this incident to be punished according to law. If the law provides for severe punishment, such punishment will be inflicted.
3. An official proclamation to be issued in the districts where there is mixed residence for the information of the soldiers and the people in general, to the effect that Japanese soldiers and subjects shall be accorded considerate treatment.
4. The Tu Chun of Fengtien Province to express, in an appropriate way, his regret to the Governor of Kwantung and the Japanese Consul-General in Mukden, when they are together at Port Arthur, but the method of this expression is left to the discretion of the said Tu Chun.
5. A solatium of \$500 is to be given to the Japanese merchant, Yoshimoto.

I avail, etc.

REPLY

Peking, the 22nd day of the 1st month
of the 6th year of the Republic of
China.

I have the honour to acknowledge the receipt of Your Excellency's note of to-day, stating

(Here follows the Japanese Minister's Note)

In reply, I have to state that I have taken note of the above articles which I find are contained in the minutes of the several conferences and the records of this Ministry.

I avail, etc.

WITHDRAWAL OF JAPANESE TROOPS

NOTE from the Chinese Minister of Foreign Affairs to the Japanese Minister.

Peking, the 22nd day of the 1st month
of the 6th year of the Republic of
China.

With regard to the Japanese soldiers despatched by the Japanese Government and stationed between Ssupinkai and Chengchiatun, I have the honour to inquire of Your Excellency as to the date when they will commence to be withdrawn and also the date when the withdrawal will be completed.

I shall be obliged by a reply setting forth the above details.

I avail, etc.

REPLY

Peking, the 22nd day of the 1st month
of the 6th year of Taisho.

I have the honour to acknowledge the receipt of Your Excellency's note of to-day, asking for the withdrawal of the Japanese soldiers stationed between Ssupinkai and Chengchiatun. The Imperial Government of Japan is of the opinion that the entire additional forces sent to be stationed at the said places in consequence of the occurrence of the Chengchiatun affair will be withdrawn, as soon as the whole arrangement embodied in the five articles which were agreed upon at the Chengchiatun negotiations has been carried out.

I avail, etc.

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